IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 76-2281

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL NO. 705, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

AARON KESNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SHERMAN CARMELL,
SHELDON M. CHARONE,
Attorneys for Petitioner.

Of Counsel:
CARMELL & CHARONE, LTD.,
39 South LaSalle Street,
Chicago, Illinois 60603.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 • 38

INDEX.

CASES CITED.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL NO. 705, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

AARON KESNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in case no. 75-1294 on May 18, 1976.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit filed on April 8, 1976 appears at 532 F2d 1169 and is appended at App. A, pp. A1-11, *infra*. The decision

and order of the National Labor Relations Board appears at 209 NLRB 292 and is appended at App. B, pp. B1-36, *infra.*

JURISDICTION.

This Court has jurisdiction under 28 USC § 1254(1). The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 18, 1976. A timely petition for rehearing in case no. 75-1294 was denied on May 18, 1976. A copy of the petition for rehearing is appended as App. C, pp. C1-7, *infra,* and the order denying the petition is appended as App. D, pp. D1-2, *infra.*

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board has the authority to decide an unfair labor practice charge alleging a union's breach of its duty of fair representation where the union's conduct was unrelated to the employee's union membership and activities or his utilization of the National Labor Relations Board processes.

2. Whether a union commits a per se violation of its duty of fair representation, and thereby § 8(b)(1)(A) of the National Labor Relations Act, only because the union places before the contract arbitral panel a legally correct and good faith contract interpretation, which is inconsistent with the grievant's position, where the union representative honestly believes that the grievant's construction may adversely affect the job rights of other represented employees.

STATUTE INVOLVED.

This case involved § 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 USC § 158(b)(1)(A), the provisions of which are set out in the opinion of the court of appeals, App. A, p. A2, n. 1.

STATEMENT OF THE CASE.

A. The Facts Leading to Aaron Kesner Filing Unfair Labor Practice Charges.

In February 1970, respondent, Aaron Kesner, a long time member of the petitioner, Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 705), was referred by Local 705 to Foster & Kleiser Company (the Employer) for a job as a truckdriver. Local 705 and the Employer were parties to a collective bargaining agreement. Kesner drove for the Employer for approximately two months before he was terminated. Kesner did not file a grievance until two years later, or about January 22, 1972. The grievance was that Kesner's contractual seniority rights had been violated when the Employer both recalled another driver and hired new drivers without first recalling Kesner; *i.e.,* a seniority bypass grievance.[1]

Upon receipt of Kesner's grievance Local 705 scheduled a first step hearing as provided in the collective bargaining agreement.[2] The resolution of the grievance turned on whether Kesner

1. Kesner's grievance was twofold. First, that he had greater seniority than driver Sher, despite Sher's earlier date of hire, because Sher could not drive a semitrailer while Kesner could. Kesner did not press this aspect of the grievance and, on October 18, 1972, acknowledged that Sher had greater seniority. Second, that he had been hired by the Employer as a permanent employee. The contract seniority provision (Article 8) does not differentiate between a temporary (casual) employee and a permanent employee. In practice, however, there is a distinction for seniority purposes only. A casual employee is one who is hired by the employer (whether via the Local 705 hiring hall or not) for the limited purpose of replacing an absent regular employee or on an emergency basis. The casual employee does not accrue seniority rights while so employed, but if the employee he replaces is permanently terminated while the casual employee is employed (and no other seniority roster employee is on lay-off status), he becomes a permanent employee and his seniority dates back to the most recent date of hire. App. B, pp. B8-9, 27.

2. Grievances involving the "interpretation or application" of terms of the collective bargaining agreement are subject to a two

(Continued on next page)

had acquired seniority rights with the Employer. Local 705's representative Don Heim said that Kesner had been hired as a temporary replacement for a sick driver and therefore had not acquired seniority; however, he deadlocked the grievance to the Joint Grievance Committee (the Committee).

On May 10 the Committee heard Kesner's grievance. Heim was not a member of the Committee. Kesner fully explained his position and the Employer argued that Kesner was hired as a temporary employee. Heim repeated the position he took at the first step grievance hearing.[3] The Committee sent the case back to the parties with instructions "that the Union Representative check all employment records of Mr. Kesner and payroll records

(Continued from preceding page)

tier procedure. The first step is a meeting between representatives of Local 705 and the employer. If the matter is settled at that level, the result is final and binding. A failure to resolve the grievance at the first step is manifested by a "deadlock" and the grievance is referred to the Joint Grievance Committee, commonly referred to as the 12 man board, composed equally of employer representatives and representatives chosen by the signator unions. If the Joint Grievance Committee "is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter." App. B, pp. B9-10.

3. "A. [Mr. Heim] * * * I also related that I didn't believe, under the contract that the man had no seniority.

Q. [By Mr. Carmeli] You told the 12-man board as far as the Sher grievance was concerned you did not feel that Mr. Kesner had a good grievance, is that right?

A. That's right.

Q. All right. Did you say anything concerning the temporary replacement issue to the 12-man board?

A. Well, this goes back into the Sher thing again. By allowing—this is my interpretation of the contract.

Q. I want to know if this is what you told the 12-man board.

A. Yes, sir.

Q. All right.

A. By allowing a man such as Aaron Kesner or anybody else to come out of the hall and work as a temporary employee while the man is in the hospital, or in the case of Aaron Kesner who worked a year, year and a half, by allowing him, he could prove seniority in two to three hundred barns in the course of two years whereby he would be on that seniority roster in two years in each particular place.

Q. This is what you are telling the board?

(Continued on next page)

to determine whether Mr. Kesner was hired as a replacement driver or as a steady employee. . . ."[4]

On October 18, 1972 the parties met to examine the Employer's records which included Kesner's employment application marked "temporary." Unable to resolve the issue to Kesner's satisfaction, the grievance was referred back to the Committee.[5] On November 8, 1972 the Committee again heard all the parties. Heim stood by his former position.[6] The Committee denied the grievance.[7]

(Continued from preceding page)

A. Yes, meaning that I could sit back being a driver working out of the hall and wait for somebody to go to work at X truck line, some place where I had worked last week, and claim a day's pay there. And you could right on down the line" (Tr. 550-2).

4. App. B, pp. B12-13.

5. After the case was referred to the Committee, Local 705 negotiated a settlement of the grievance which Kesner accepted and then rejected. *Id.* at B15-16.

6. "A. [Mr. Heim] I told them that with regards to Sher and Aaron Kesner seniority, going by the contract Mr. Kesner would accrue no seniority as a part-time or not part-time, strike that word, as a temporary employee. He would accrue no seniority because on this basis he could easily end up with seniority in a hundred to two hundred barns. In regards to the other portion of his grievance, whether he was entitled to pay for each day, immediately after they used a man because a permanent driver had to go to court or what have you, this was another issue.

Q. [By Mr. Carmell] Did you take any position before the board with respect to that issue?

A. Based on the evidence that I had seen I couldn't see where he had a valid claim.

Q. All right. What was the evidence that you had seen which caused you to come to that conclusion?

A. His application for employment.

Q. What was it about the application for employment that caused you to come to that conclusion?

A. It was marked temporary.

Q. What else?

A. Based on the health and welfare, pension remittance forms, it showed the whole period of time where Aaron had worked in place of Flood I believe the guy's name is they had remitted health and welfare for that period of time and immediately upon his return they immediately dropped Aaron." (Tr. 557-8).

7. "After considering the evidence, including the fact that during the eleven month period in question between 1970-1971, Aaron

(Continued on next page)

B. The Proceedings Before the National Labor Relations Board.

Upon unfair labor practice charges filed by Aaron Kesner, the National Labor Relations Board (the Board) issued and amended a complaint alleging that Local 705 had violated § 8(b)(1)(A) of the National Labor Relations Act, as amended (the Act), by failing to represent Aaron Kesner fairly in the grievance proceedings.[8] The case turned upon Local 705's conduct at the November 8 Committee hearing.[9]

The Board found[10] that Kesner's seniority grievance "was without merit"; that "Local 705 did not fail to process Aaron Kesner's grievance for any reason, discriminatory or otherwise";[11] and that the Local 705 representatives

> were acting in good faith and were legally correct in interpreting and applying the provisions of the joint cartage agreement to A. Kesner's claim. Their fear that A. Kesner's contention would cause mild havoc as a precedent in their industry for the awarding of multiple seniority was a legitimate factor disagreeing with his contention. Whatever they or any other union official did thereafter in seeing to it that A. Kesner "got his day in court" was a work of supererogation.[12]

(Continued from preceding page)
Kesner knew that Sher has been recalled and refused the job and filed no grievance; that the company did not increase the work force during the period; that he did not grieve when Flood returned; and that the present grievance was not filed until March of 1972; upon motion and a second, the grievance is denied. Majority vote." App. B, pp. B3, 17.

8. The operative paragraph of the amended complaint alleged that: "Since on or about February of 1972, and continuing to date, Respondent has arbitrarily, discriminatorily and without good cause, failed to fairly represent the Charging Party [Aaron Kesner] during the processing of a grievance filed by the Charging Party" (GCX 1(v)).

9. App. B, pp. B27-28.

10. The Board adopted each finding of fact and credibility resolution made by its administrative law judge. *Id.* at B1, 2 n. 2, 3.

11. *Id.* at B26, 28.

12. *Id.* at B27.

After concluding that Kesner was "most articulate and quite capable of speaking on his own behalf to the Committee or to anyone else,"[13] the Board and its administrative law judge parted company.

The administrative law judge concluded that the Local 705 representatives were not "under a duty to swallow their own beliefs and speak on A. Kesner's behalf at the . . . November 8 meeting of the Committee. . . . Indeed, there was no reason they should not state to the committee their own good faith and legally correct view that A. Kesner's claim was without merit."[14]

The Board, however, while agreeing that Heim acted in good faith and was correct, concluded that once Local 705 undertook to present Kesner's grievance to the Committee, "it became obligated to represent him fully and fairly . . . [including] the duty to act as advocate for the grievant. . . . [B]y saying that he did not believe Aaron Kesner's claim was valid, Heim undermined Kesner's case" before the Committee. Therefore, Local 705 "breached its duty of fair representation and restrained and coerced Kesner in the exercise of his Section 7 rights, thereby violating Section 8(b)(1)(A) of the Act."[15] The Board entered a cease and desist order but declined to "grant an affirmative remedy" because the grievance was without merit.[16]

C. The Proceedings Before the Court of Appeals.

Pursuant to § 10(f) of the Act, Kesner petitioned the court of appeals to review and set aside that part of the Board's order which refused to require an affirmative remedy against Local 705 (No. 75-1073). Local 705 was permitted to intervene only to support that part of the Board's order. The court

13. *Id.* at n. 21.

14. *Id.* at B27-28.

15. *Id.* at B2-3.

16. *Id.* at B3.

of appeals, concluding that the Board had not abused its discretion in the choice of remedies, denied the petition.[17]

Local 705, pursuant to § 10(f), petitioned the court of appeals to review and set aside that part of the Board's order which found that Local 705 had violated § 8(b)(1)(A) of the Act by Heim's conduct before the Committee (No. 75-1294, hereinafter "this case"). The court of appeals first dealt with Local 705's standing to challenge the Board's *Miranda Fuel* doctrine; *i.e.*, the Board has the authority to find a § 8(b)(1)(A) violation for the breach of fair representation absent motives relating to union membership or activities.[18] After finding that Local 705 had not appropriately "pressed this objection" before the Board,[19] the court of appeals decided that it had "jurisdiction to consider serious legal objections, based on the coherent and historical analysis of relevant case law, which claim that the National Labor Relations Board has patently traveled beyond the orbit of its authority. . . ."[20]

On the merits, the court of appeals first, while conceding that this Court has not squarely passed upon the issue,[21] opted for the views of the courts of appeals for the Fifth[22] and District of

17. App. A, p. A10.

18. *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement den'd* 326 F2d 172 (2nd Cir 1963); App. A, pp. A3, 6 n. 4.

19. App. A, p. A5. The court of appeals' finding was erroneous. At oral argument counsel for the Board and Local 705 agreed that Local 705 had raised the *Miranda Fuel* issue in its brief to the Board in support of its cross-exceptions (Petition for Rehearing at 2; App. C, p. C2). Under *Barton Brands* v. *NLRB*, 529 F2d 793, 801 (7th Cir 1976); App. A, p. A5, raising an issue in a brief to the Board is compliance with § 10(e) of the Act. Local 705's objection was therefore properly before the court of appeals. There is no dispute that Local 705 had standing to challenge the Board's ultimate finding that Heim's conduct before the Committee violated § 8(b)(1)(A).

20. App. A, p. A7.

21. *Id.* at A7-8.

22. *Rubber Workers Local 12* v. *NLRB*, 368 F2d 12, 20 (5th Cir 1966), *cert. den'd.* 389 US 837 (1967).

Columbia[23] circuits supporting *Miranda Fuel*, rather than those of the Second Circuit.[24] Next, while recognizing that Local 705's position before the Committee was made in good faith and legally correct, the court of appeals embraced the Board's view that once Local 705 took Kesner's grievance to the Committee it was duty bound not to "[proclaim] a lack of merit" in the grievance, thereby administering "a *coup de grace* to the claim, * * * even though ultimately it was also determined that it was an unnecessary dagger."[25] The courts of appeals did not discuss this Court's opinion in *Humphrey*[26] or *Hines*.[27]

23. *Teamsters Local 568* v. *NLRB*, 379 F2d 137 (DC Cir 1967).

24. *NLRB* v. *Miranda Fuel Co.*, 326 F2d at 180.

25. App. A, pp. A9-10.

26. *Humphrey* v. *Moore*, 375 US 335 (1964) (Reply Brief for Local 705 at 4 ff.; Petition for Rehearing at 4-5; App. C, pp. C4-5).

27. *Hines* v. *Anchor Motor Freight, Inc.*,..... US. ....., 47 L Ed 2d 231 (1976) (Petition for Rehearing at 4-6; App. C, pp. C4-6).

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT IN THE AREA OF A UNION'S DUTY OF FAIR REPRESENTATION.

The decision below conflicts with this Court's labor decisions in two important areas of a union's duty of fair representation.

First, *Humphrey* says that a union "must be free to take a position" on contract seniority disputes "when the issue is chiefly between two sets of employees," for "[t]o remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." Where the record shows that "the union took its position honestly, in good faith and without hostility or arbitrary discrimination"—*i.e.*, based upon "wholly relevant considerations" rather than "capricious or arbitrary factors"—the union does not breach its duty of fair representation.[28] Because Local 705's position before the Committee concededly met these criteria the court of appeals' conclusion that Local 705's conduct was either arbitrary or constituted malfeasance[29] is in direct conflict with *Humphrey*.

Second, a union cannot breach its duty of fair representation in the handling of a meritless grievance. "To prevail against either the company or the Union, petitioners must show not only that their discharge was *contrary to the contract* but must also carry the burden of demonstrating breach of duty by the Union."[30] In other words, " 'a union may not arbitrarily ignore *a meritorious grievance* or process it in a perfunctory fashion.' "[31]

28. *Humphrey* v. *Moore*, 375 US at 349-50.

29. App. A, p. A9. Simply because it took a good faith position contrary to the grievant's, a union is not guilty of malfeasance. *Hines* v. *Anchor Motor Freight*, 47 L Ed 2d at 244.

30. *Id.* at 245 (emphasis added).

31. *Id.* at 244 (emphasis added), quoting from *Vaca* v. *Sipes*, 386 US 171, 191 (1967).

Because Kesner's grievance was without merit, Local 705 had processed that grievance through the contract grievance procedure, and Heim's statements to the Committee were irrelevant to the Committee's decision to deny the grievance, *Humphrey*, *Vaca*, and *Hines*[32] required the court of appeals to hold that Local 705 did not violate § 8(b)(1)(A). Its failure to do so is in direct conflict with those decisions of this Court.

The decisions of the court of appeals and the Board in this case significantly distort the standards of conduct imposed upon the collective bargaining representative in the processing of a grievance involving competing interests of employees. Imposing upon the union the burden to act "as an advocate in presenting a grievant's position when it had undertaken to do so,"[33] misapprehends the nature of the union's duty and conflicts with its obligation "to take a good faith position contrary to that of some individuals whom it represents * * * on the not so frivolous disputes."[34]

The result is a dual standard. Under *Humphrey*, *Vaca* and their progeny, the federal courts have uniformly decided that Heim's conduct does not violate Local 705's duty.[35] The Board, however, with approval of the court of appeals, reached a contrary result by refusing to follow this Court's decisions. Of course, § 8(b)(1)(A) affords no basis for this variance. The duty of fair representation was "judicially evolved without participation of the NLRB,"[36] and the standards for measuring the adequacy of the union's performance are those "developed by the federal courts," *i.e.*, the Humphrey criteria.[37] *Miranda Fuel*, however, has put the Board "into the business of regulat-

32. *Id.* at 244.

33. App. A, p. A8.

34. *Humphrey* v. *Moore*, 375 US at 349.

35. See cases in note 46, *infra*.

36. *Motor Coach Employees Union* v. *Lockridge*, 403 US 274, 301 (1971).

37. *Vaca* v. *Sipes*, 386 US at 180.

ing" grievance practices of unions. "The necessary result of this intrusion would be the imposition of another layer of federal regulation of the same subject matter, with the inevitable potential for conflicts. . . ."[38]

The decision below presents another anomaly which conflicts with the direction taken by this Court. Under *Vaca* a union may in good faith refuse to process a grievance, thereby depriving the employee of any opportunity to present a case to any arbitral group. Yet, when that union agrees to go "the extra mile"[39] and gives the employee an opportunity to present his contract interpretation to the grievance Committee, the court of appeals, relying on "venerable tort law,' "[40] says that the union *automatically* violates § 8(b)(1)(A) *only* because it expressed its correct and contrary interpretation. Do not give the employee "a day in court" and a union is safe. Grant the employee that day and the union breaches its duty unless the representative lies to, or withholds the union's interpretation from, the panel to the detriment of other employees. Such "Catch 22" reasoning is totally at odds with logic and precedent.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

The decision in this case conflicts with the decision of another court of appeals on the viability of the *Miranda Fuel* doctrine and the duty of a union to advocate a meritless seniority grievance to the potential detriment of other represented employees.

38. *NAACP* v. *FPC*, 48 LEd2d 284, 293-4 (1976) (Burger, C.J. concurring).

39. App. B, p. B27.

40. App. A, p. A9. This Court has rejected the concept that the administration of the collective bargaining agreement should be strictured by concepts of venerable contract law. *John Wiley & Sons, Inc.* v. *Livingston*, 376 US 543, 550 (1964). There is no reason why venerable tort law should fare any better.

A. The Conflict on the Miranda Fuel Doctrine.

The decision below that § 8(b)(1)(A) gives the Board jurisdiction to decide a fair representation unfair labor practice charge, absent considerations of union membership or activities, is supported by other courts of appeals[41] but rejected by the Second Circuit.[42] This Court has not passed upon this issue[43] despite its importance[44] and recurrence.[45]

41. *Rubber Workers Local 12* v. *NLRB*, 368 F2d at 20 (racial discrimination); *Teamsters Local 568* v. *NLRB*, 379 F2d at 141-2 (seniority); *cf. Kling* v. *NLRB*, 503 F2d 1044, 1046 (9th Cir 1975) (seniority).

42. *NLRB* v. *Miranda Fuel Co.*, 326 F2d 172. Judge Medina adopted the views of the Board's dissenters, 326 F2d at 180, that to violate § 8(b)(1)(A) "the discrimination must be 'to encourage or discourage membership in any labor organization,' " 140 NLRB at 193, and that an aggrieved employee had recourse to the courts which "have furnished, and do furnish, a remedy. Congress has throughout the years indicated no dissatisfaction with this remedial scheme. The position here advocated by the majority represents . . . an unwarranted extension of Board authority," *id.* at 202. Judge Lumbard reasoned that the court need not reach the issue because of the paucity of evidence to support the Board's order. 326 F2d at 180. Judge Friendly, dissenting, found persuasive the reasoning of the Board's majority. *Id.* at 182-5. The decision is still the law in that circuit. *NLRB* v. *Electrical Workers Union Local 485*, 454 F2d 17, 21 n. 6 (2nd Cir. 1972). The court of appeals in this case adopted Judge Friendly's views. App. A, p. A8.

43. *Humphrey* v. *Moore*, 375 US at 344; *Bleier* v. *NLRB*, 457 F2d 871, 872 (3rd Cir 1972); *Williams* v. *PMA*, 384 F2d 935, 937 (9th Cir 1967); *but cf. Kling* v. *NLRB*, 503 F2d at 1046.

44. *NLRB* v. *Miranda Fuel Co.*, 326 F2d at 177. The court of appeals classified Local 705's challenge to the Board's jurisdiction as "serious legal objections." App. A, p. A7. At least one Board member has expressly rejected the *Miranda Fuel* doctrine, *Teamsters Local 692*, 209 NLRB 446, 449 (1974) (Fanning concurring), and one member has apparently not squarely passed on the question, *Coca-Cola Bottling Co.*, 199 NLRB 46 n. 3 (1972), leaving the current status of the doctrine in doubt, *Meva Corporation*, 189 NLRB 31, 36 (1971).

45. *See, e.g., Teamsters Local 315*, 217 NLRB No. 95 (1975); *Alcoa Construction Systems, Inc.*, 212 NLRB 452, 458 (1974); *Teamsters Local 692*, 209 NLRB 446 (1974); *Pacific Maritime Association*, 209 NLRB 519 (1974); *Painters Union Local 1066*, 205 NLRB 651, 652 (1973). The issue has produced a spate of commentary. *See Rubber Workers Local 12* v. *NLRB*, 368 F2d at 19 n. 11; App. A, p. A8.

B. The Conflict on the Duty of the Union to Advocate the Interest of the Individual Employee Without Regard to the Group Interest.

The decision below that the union is the individual employee's "advocate" stands in sharp contrast to the decisions of other courts of appeals.[46] Also, the finding that Local 705's action was arbitrary conflicts with the decision of another court of appeals that a union's conduct in the processing of a grievance is not arbitrary if "(1) based upon relevant, permissible union factors . . .; (2) a rational result of the consideration of those factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees."[47] All of those factors are present in this case.

Considerations of sound judicial administration of federal labor policy warrant the review and reversal by this Court of the decision below which conflicts with decisions of this Court and other courts of appeals. The record in this case and the decision below present to this Court a unique opportunity to resolve the *Miranda Fuel* issue; *i.e.*, whether the Board "has patently traveled beyond the orbit of its authority."[48] Unions are faced with burgeoning litigation before a forum which well may lack jurisdiction to hear and decide the charges. This Court can now put the issue to rest on a clean record.

Also squarely presented for review is the anachronistic and mischievious holding that the union agent is solely the lawyer

46. *Tedford* v. *Peabody Coal Co.*, ... F2d ....., 92 LRRM 2990, 2994 (5th Cir 1976); *Watson* v. *Teamsters Union*, 399 F2d 875, 880 (5th Cir 1968); *Green* v. *Los Angeles Stereotypers Union Local 58*, 356 F2d 473, 475 (9th Cir 1966); *Hardcastle* v. *Western Greyhound Lines*, 303 F2d 182, 187, 188 (9th Cir 1962); *cf. Price* v. *Teamsters Union*, 457 F2d 605, 611-12 (3rd Cir 1972). Also *compare* the decision below *with Schick* v. *NLRB*, 409 F2d 395, 399 (7th Cir 1969).

47. *Tedford* v. *Peabody Coal Co.*, 92 LRRM at 2994-5 (footnotes omitted).

48. App. A, p. A7.

for the grievant rather than the representative of the interests of the whole membership. The holding should be reversed because it conflicts with the reasoned and uniform federal labor policy emanating from this Court. As long as the decision below stands, uniformity of that policy is at an end and a primary function of the union is throttled.

CONCLUSION.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

SHERMAN CARMELL,
SHELDON M. CHARONE,
Attorneys for Petitioner.

Of Counsel:
CARMELL & CHARONE, LTD.,
39 South LaSalle Street,
Chicago, Illinois 60603.

Dated: August 9th, 1976.

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1073

AARON KESNER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL No. 705, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

No. 75-1294

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL 705, etc.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petitions for Review of an Order of the National Labor Relations Board, Washington, D.C.

ARGUED NOVEMBER 3, 1975 — DECIDED APRIL 8, 1976

Before HASTINGS, *Senior Circuit Judge,* PELL, and BAUER, *Circuit Judges.*

PELL, *Circuit Judge.* These cases are before the court upon section 10(f) petitions for review of an order of the National Labor Relations Board. In Petition No. 75-1073, Aaron Kesner seeks to review and set aside that part of the NLRB order which refused to require an affirmative remedy against Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local 705 (Local 705) for a breach of the duty of fair representation. Local 705 was granted leave to intervene in No. 75-1073 to the extent it seeks to have this court affirm the Board's finding and order in that case. In Petition No. 75-1294, Local 705 seeks to set aside that part of the same NLRB order which found that Local 705 had violated § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A),[1] in the processing of Kesner's seniority grievance. The Board's decision and order appears at 209 NLRB No. 46 at 292 (1974). The Board has not cross-filed under section 10(e), 29 U.S.C. § 160 (e), seeking enforcement of its order.

Factual Background

The underlying factual situation precipitating these cases stems from Kesner being referred by Local 705 to the Foster and Kleiser Company (F & K) in February, 1970, for a job as a truckdriver. Kesner drove for F & K approximately two months before his employment was terminated. The controversy which was involved in Kesner's grievance was whether he acquired seniority rights or any sort of permanent employee status. The particular facts upon which Kesner based his claim as well as those relating to the processing of his grievance are set forth in detail in 209 NLRB at 294 et seq. The grievance procedures were ultimately resolved against Kesner, and the matter was brought into the NLRB sphere by a complaint based upon Local 705's handling of the Kesner grievance.

On the facts developed at the hearing, the Board, contrary to the Administrative Law Judge (ALJ), concluded that Local 705, through its Business Representative Donald Heim, had breached its duty of fair representation

[1] Section 8(b)(1)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title, . . ."

towards Kesner, thereby restraining his section 7 rights and violating section 8(b)(1)(A) of the Act. (29 U.S.C. §§ 157 and 158(b)(1)(A) respectively.) In the Board's view, once the union undertook to present Kesner's grievance to the arbitral committee, it was obliged to act as his advocate and present his grievance in the light most favorable to him. By stating that the grievance was without merit, Heim undermined Kesner's case before the committee, and by this conduct the union breached its duty of fair representation. The Board ordered the respondent union to cease and desist from such conduct. The Board, however, found no basis for reversing the ALJ's finding that Kesner's grievance was without merit, and it therefore determined that an affirmative remedy was not justified.

Petition No. 75-1294

A. Section 10(f) Scope of Review

Generally speaking, Local 705 challenges the Board's finding of an unfair labor practice on the part of the union in breaching its duty of fair representation, where the union's conduct was unrelated to the employee's union membership and activities or his utilization of the Board's processes. The union's position, again generally, is that the Board was relying upon the doctrine enunciated in *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F. 2d 172 (2d Cir. 1963), and that this doctrine is no longer viable.

Before reaching this "merits" issue, we must consider the contention of the Board that the issue is not properly before this court since the contention that *"Miranda Fuel* is dead" was not presented to the Board and since there were no special circumstances excusing Local 705's failure to give the Board an opportunity to pass on this question, citing section 10(e) of the Act, 29 U.S.C. § 160(e), as precluding this court's consideration.[2] The present matter, of course, is before the court pursuant to section 10(f)

[2] The Board also refers us to: *Marshall Field and Co.* v. *N.L.R.B.*, 318 U.S. 253, 255-256 (1943); *N.L.R.B.* v. *Good Foods Mfg. & Processing Co.*, 492 F.2d 1302, 1305 (C.A. 7, 1974); *Red Cross Drug Co.* v. *N.L.R.B.*, 419 F.2d 1245, 1248 (C.A. 7, 1969); *U.S.* v. *L. A. Tucker Truckline, Inc.*, 344 U.S. 33, 36-37 (1952).

rather than 10(e).[3] We are of the opinion that there is jurisdictional equivalence between the two sections in view of the references in section 10(f) to conducting proceedings in the same manner and to making and entering decrees in a like manner.

The union in response to the Board's first line of argument relies in part upon the fact that when it sought to intervene in Kesner's review proceedings the Board objected stating that if the union desired review of the Board's decision adverse to it, "it may employ the simple expedient of filing a petition to review under section 10(f) of the Act." We are not persuaded that the Board's prior suggestion that Local 705 file a § 10(f) petition precludes the Board from now challenging the union's right to attack the Board's order on any legal basis it chooses. The suggestion scarcely invokes the application of waiver or estoppel concepts. See *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253, 256 (1943).

The relevant portion of the cross-referenced section 10(e) provides:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Under applicable Board rules, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these foregoing requirements may be disregarded." 29 C.F.R. § 102.46(b).

Local 705 urges that it can raise the *Miranda Fuel* objection before this court because it won before the ALJ and therefore had no cause to urge this point or any other point before the Board. As authority for this position, Local 705 cites *N.L.R.B.* v. *Teamsters Local 282*, 412 F. 2d 334, 337 n.2 (2d Cir. 1969), *cert. denied*, 396 U.S.

[3] The absence of a Board petition for enforcement in the present case stems from the fact that Local 705 has fully complied with the Board order. Although petitioner Kesner disputes this fact, the Board avers that the Chicago Regional Office "acted well within its discretion in finding there had been compliance with the Board's order and in thereafter closing the case." We accept the fact of compliance as established.

1038 (1970), and *N.L.R.B.* v. *Good Foods Mfg. Co.*, 492 F. 2d 1302, 1305 (7th Cir. 1974). We do not find that these cases require this court to conclude that Local 705 has shown "extraordinary circumstances" excusing its failure to present the *Miranda Fuel* question to the Board, and we find no such circumstances under the factual circumstances of this case. See also *Barton Brands* v. *N.L.R.B.*, ... F.2d ....., Nos. 74-2082, 75-1102, 75-1136 (7th Cir. January 16, 1976).

While *Good Foods* uses language facially supporting Local 705's position, this court in that case found that the exception for extraordinary circumstances was inapplicable because the ALJ's decision was basically adverse to Good Foods and the major factual findings were initially determined against Good Foods by the ALJ.

In the present case, the ALJ at least impliedly, made a finding or conclusion adverse to Local 705. By hearing the evidence and formulating a recommended decision, the ALJ implicitly concluded that the NLRB had jurisdiction over the unfair labor practice charge. Indeed, at the outset of his treatment of the alleged breach by Local 705 of its duty to represent Kesner in processing his grievance, the ALJ observed that "[t]he existence of a duty imposed upon a bargaining agent to represent all employees in a bargaining unit, free from unfair, irrelevant, or invidious discrimination, can be found in Board cases going back to *Miranda Fuel Co.* . . ." 209 NLRB at 304. If Local 705 believed that NLRB jurisdiction under *Miranda Fuel* represented either an erroneous conclusion of law or an incorrect Board policy, it could easily have pressed this objection. The applicable regulations dealing with exceptions or cross-exceptions explicitly state that such objections can specifically question matters "of procedure, fact, law, or policy. . . ." 29 C.F.R. § 102.46(b); § 102.46(e). Although Local 705 now casts its *Miranda Fuel* argument in terms of a lack of Board jurisdiction, it could have formulated its contention in the form of a policy objection, particularly in view of the preemption principles by which both the NLRB and the Supreme Court have drawn the lines of exclusive or concurrent jurisdiction. See A. Cox, *Labor Law Preemption Revisited*, 85 HARV. L.REV. 1337 (1972). Since we

think the jurisdictional form of the contention is not frivolous, we shall approach the matter in the manner in which the question is now framed.

The Board cites *Red Cross Drug Co., supra* at 1248, in support of its position that this court cannot pass upon the jurisdictional contention. In that case in none of the Board proceedings had the company raised the issue or otherwise questioned the Board's assertion of jurisdiction. Resting on the relevant language of section 10(e) and, at least in part on *N.L.R.B.* v. *Ochoa Fertilizer Co.*, 368 U.S. 318 (1961), this court found that Red Cross was estopped from raising the jurisdictional contention before this court. The court then went on to find that, even in the absence of the barring provision of § 10(e), the company's contention on the merits was unsupportable. *Id.* at 1248.

At first glance, the present review petition appears to present a problem analogous to that in *Red Cross*. In that case, however, the respondent was arguing against an assertion of Board jurisdiction on the ground that it had transgressed its own self-imposed gross volume limitation for retail enterprise. In this case, the jurisdictional objection stems from an entirely different source. Local 705 has detailed the rationale and history of the Board's *Miranda Fuel* doctrine,[4] and has suggested that the Supreme Court has not yet passed on the doctrine while the Board itself has questioned its present vitality. We think that there is considerable difference between a jurisdictional contention attacking a self-imposed jurisdictional limitation and one asserting that court decisions have eroded the vitality of an arguably incorrect Board conclusion without which the Board would have had no statutory basis for entertaining the proceedings.

In the § 10(e) situation, the Supreme Court has held that the court in which the Board has sought enforcement "need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." *N.L.R.B.* v. *Cheney*

[4] Local 705 capsulizes the doctrine in one short sentence, i.e., "The Board has the authority to find a § 8(b)(1)(A) violation for the breach of fair representation absent motives relating to union membership or activities."

Lumber Co., 327 U.S. 385, 388 (1946). See also *Ochoa, supra* at 322; *N.L.R.B.* v. *Red Spot Electric Co.*, 191 F. 2d 697 (9th Cir. 1951). We recognize that the cases which have rejected the Board's § 10(e) contentions where there were claims of NLRB usurpation of authority are not necessarily applicable to the § 10(f) petition situation. In the § 10(e) situation, the court would be directly implicated in the enforcement of an administrative order beyond the jurisdiction of the agency which, of course, it would not be doing in the § 10(f) situation. As to the § 10(e) situation, it appears to us that a proper underlying premise of the holdings that review was available stems from the traditional considerations activated in the exercise of equitable powers and the natural desire of the judiciary to foster and promote adherence to fundamental legal principles.

We see no strong policy reason for denying review to a petitioner who has fully complied with an order which it seriously contends was beyond the authority and jurisdiction of the Board. A proper analysis of the reasons for judicial review suggests that this court has the same jurisdiction in a section 10(f) review context as it possesses in the section 10(e) enforcement context. However, the presence of limiting language in the *Cheney* and *Ochoa* opinions suggests that we take a narrower approach. Accordingly, we hold that section 10(f), 29 U.S.C. § 160(f), grants to the courts of appeals the same jurisdiction to consider serious legal objections, based on the coherent and historical analysis of relevant case law, which claim that the National Labor Relations Board has patently traveled beyond the orbit of its authority as does section 10(e), 29 U.S.C. § 160(e).

B. The Merits of the *Miranda Fuel* Argument

Our conclusion that Local 705's argument regarding the *Miranda Fuel* doctrine falls within the scope of review provision of section 10(f) does not mean that its contention is meritorious. On the contrary, we conclude that the recent Supreme Court decisions reaffirming the doctrine of fair representation and allowing a broader judicial exception to the preemption doctrine cannot be read to imply a holding that the NLRB has no jurisdiction over unfair representation cases. Although the Supreme Court

has held that the courts should retain jurisdiction in cases involving conduct which arguably constitutes an unfair labor practice, see *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Vaca* v. *Sipes*, 386 U.S. 171 (1967), its decisions have not expressly ousted the NLRB of jurisdiction over such cases. Indeed, *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50 (1975), points in the opposite direction.

In our opinion, on the record before us, the Board was acting within the scope of the Act when it concluded that Local 705 violated § 8(b)(1)(A). As the Fifth Circuit observed in *Rubber Workers Local 12* v. *N.L.R.B.*, 368 F. 2d 12, 20 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), the language of section 8(b)(1)(A), unlike certain other provisions of section 8, is not restricted to discrimination which encourages or discourages union membership. While we would have difficulty in saying that a union's failure to act vigorously as an advocate in presenting a grievant's position when it had undertaken to do so would be unrelated to an employee's union membership and activities, we do not propose, in any event, to read into the statute language which the Congress did not put there. In a somewhat analogous context, the recent *Barton Brands* decision of this court suggested that limiting breach of the duty of fair representation claims to those relating specifically to union membership or activities was not acceptable. Although the court there did not pass directly on the § 8(b)(1)(A) question, it briefly referred to the duty of fair representation and cited approvingly *Truck Drivers and Helpers, Local Union 568, Teamsters* v. *N.L.R.B.*, 379 F. 2d 137 (D.C. Cir. 1967), and Judge Friendly's dissent in *Miranda Fuel*, 326 F. 2d 172, 180-86. In its brief in this case, Local 705 candidly admits that *Local 568, supra*, stands for exactly the same proposition as *Rubber Workers*, which we have here followed. See also Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973).

The union also challenged the Board's holding on the basis that it in effect establishes a per se violation of its duty of fair representation, and thereby § 8(b)(1)(A) of the Act, only because the union places before the contract arbitral panel a legally correct and good faith con-

tract interpretation, which is inconsistent with the grievant's, where the union honestly believes that the grievant's construction may adversely affect the job rights of other represented employees. Even though the Board ruling may properly be considered as having prima facie aspects reflecting upon whether a union met its obligation of fair representation, we are not persuaded that the Board has created a per se rule. The Board had the complete record of the processing of Kesner's grievance before it, and it was able to place Heim's statement that Kesner did not have a valid grievance into the context of the various meetings and hearings. Assuming that Heim's statement to the November 8, 1972, Joint Grievance Committee represented a legally correct and good faith interpretation of the collective bargaining agreement, and that acceptance of Kesner's position would adversely affect the job rights of other represented employees, we note that "proof of good faith on the part of a union is not a defense to a charge based on the duty of fair representation since arbitrary conduct without evidence of bad faith has been held by this Circuit to constitute a breach of the duty." *Barton Brands, supra* at 9, citing *Orphan* v. *Furnco Construction Corp.*, 466 F. 2d 795 (7th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (7th Cir. 1972). Accord, *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975); *Beriault* v. *Local 40, Super Cargoes and Checkers*, 501 F. 2d 258 (9th Cir. 1974).

We are not unmindful of Local 705's argument that a union may in good faith refuse to process a member's grievance altogether, a premise which the Board does not controvert. It is venerable tort law that purporting to take action where duty is nonexistent creates in itself certain duties, or as the Board puts the matter, "it is a commonplace of our jurisprudence that those who act where they are not obliged to are nevertheless liable for misfeasence [sic] in the course of their undertaking." It is one thing for a grievant to attempt to pursue his remedy without assistance and opposed only by one adversary. When that situation is compounded by two opponents, one of whom is supposedly his "own people," the bearing on the likelihood of his success assumes substantial significance. When one's own representative who has been willing to assume that status proclaims a lack of merit, it is

indeed likely to be a *coup de grace* to the claim. The Board held that it was upon the facts of the case before us even though ultimately it was also determined that it was an unnecessary dagger.

On the basis of the record in this case, it is our holding that the Board's conclusion that Local 705, through Business Agent Heim, breached its duty of fair representation by failing to meet the obligation it undertook of fully and fairly advocating Kesner's grievance must be sustained on the union's petition to review.

Petition 75-1073

Petitioner Aaron Kesner asks this court to set aside that part of the NLRB order which refused to require an affirmative remedy against Local 705 for its breach of the duty of fair representation. Section 10(c) of the Act, 29 U.S.C. § 160(c), provides that the Board may order a violator "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter. . . ." It is well established that the Board's choice of remedies will not be disturbed on review in the absence of a clear abuse of discretion. *E.g., N.L.R.B.* v. *My Store, Inc.,* 468 F.2d 1146, 1149 (7th Cir. 1972), *cert. denied,* 410 U. S. 910 (1973). The Board's discretion in the selection of remedies is broad, and the scope of review for this court is narrow. Under section 10(f), 29 U.S.C. § 160(f), the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole are conclusive.

In this case, the Board found that Kesner was initially hired by F & K as a temporary employee and that, as such, he did not accrue seniority for purposes of recall from layoff and that, therefore, his grievance was without merit. Under these circumstances, the Board concluded that the Union's failure fully and fairly to represent Kesner did not cause him to suffer any loss of earnings. Moreover, the Board and the ALJ credited the testimony of those witnesses who stated that if the union and an employer both understand that any em-

ployee is being hired on a temporary basis, the temporary employee accrues no seniority absent unusual circumstances. The Board found on the basis of record evidence that temporary employees do not accrue seniority under the collective bargaining agreement.

The Board's findings are supported by substantial evidence, and this court is without power to set them aside. Kesner seeks to have the record reopened on the basis of approximately 160 pages of documents. However, we accept the NLRB assertion that these documents and records merely buttress Kesner's claim that on numerous occasions the Union dispatched various employees to F & K in derogation of his claimed seniority. Since the Board's finding that Kesner was hired as a temporary employee is conclusive, as is its finding that Kesner accrued no seniority, any such documents would be immaterial and would not warrant a remand for further proceedings. Accordingly, this court can adhere to the substantial evidence rule of § 10(f) only by a denial of the petition for review.

Kesner along with his brother, as noted by the ALJ, 209 NLRB at 294-95, was involved as a protagonist in divers cases before the NLRB. In his appearance before us in the present case, he has attempted to raise various matters which pertain to cases not properly before us. While we are not unsympathetic to his determined pursuit of what he apparently sincerely believes to be his unvindicated rights, we decline to extend the scope of this proceeding beyond the boundaries of those matters properly before us.

For the reasons hereinbefore set out the petitions for review are

DENIED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—4-8-76—250

APPENDIX B

Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.) *and* Louis Kesner.

Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Foster and Kleiser) *and* Aaron Kesner. Cases 13–CB–4687 and 13–CB–4693

February 28, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On September 6, 1973, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Parties filed exceptions and supporting briefs, and the General Counsel filed a brief in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

The Administrative Law Judge found that certain statements made by agents of Respondent to Aaron Kesner on October 18 and December 26, 1972, and communicated by him to his brother, Louis Kesner, to the effect that Respondent would prevent Louis Kesner from working violated Section 8(b)(1)(A) of the Act. We agree with those findings. The Administrative Law Judge further found that certain threats of physical harm made by Respondent's agents to

[1] Respondent has excepted *inter alia* to the Administrative Law Judge's revocation of certain portions of the *subpoena duces tecum* served by Respondent on the Regional Director for Region 13. Specifically, Respondent excepted to the refusal of the Administrative Law Judge to require the Regional Director to produce memoranda from the General Counsel's Offices of Advice and Appeals in Washington, D.C., to the Regional Director relating to all closed CB cases from the calendar years 1967 through May 31, 1973, in which Aaron Kesner was the Charging Party and Local 705 the Respondent. Inasmuch as we find that the subpenaed documents relate only to collateral issues and are not material to the case at bar, we find no error in the Administrative Law Judge's revocation of these portions of the subpena. Furthermore, in affirming his ruling, we would note that the Board does not in any way consider or rely on the material sought in reaching its decisions and, thus, did not have such before it in coming to its Decision and Order herein. Assuming *arguendo*, however, that Respondent was entitled to these documents regardless of their relevancy or nonuse by us, Respondent has not shown any prejudice arising from the Administrative Law Judge's ruling. Accordingly, we find this exception to be without merit.

[2] The Respondent and Charging Party Aaron Kesner have also excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] We agree with the Administrative Law Judge that a broad cease-and-desist order is appropriate in the instant case. However, we do not find that the extraordinary requirement of publication of the attached notice is justified on this record.

Aaron Kesner on August 29 and October 18, 1972, violated Section 8(b)(1)(A) of the Act. We agree with his finding as to the statements made on October 18. However, with respect to the statements made on August 29, counsel for the General Counsel explicitly stated at the hearing that evidence of these threats was being offered only to show Respondent's animosity toward the Kesners, and not to prove a separate violation. In view of this disclaimer, we do not adopt the Administrative Law Judge's finding that the threats made to Aaron Kesner on August 29, 1972, violated Section 8(b)(1)(A).

The Administrative Law Judge further found that Respondent did not breach its duty of fair representation by the manner in which it processed Aaron Kesner's grievance based on employer Foster and Kleiser's failure to recall him from layoff in accordance with seniority. We disagree with that finding as it relates to the conduct of Respondent's agent, Don Heim, at the Joint Grievance Committee meeting of November 8, 1972. It is clear from the record that Heim, who attended the meeting as spokesman for Respondent (and hence for Aaron Kesner), openly stated at that meeting that he believed that Kesner did not have a valid grievance. By making this statement, Heim in effect abdicated his duty to present the grievance in the light most favorable to Kesner.

In our view, once Respondent undertook to present Aaron Kesner's grievance to the Joint Grievance Board, it became obligated to represent him fully and fairly. This obligation included the duty to act as advocate for the grievant, which here Heim clearly did not do. To the contrary, by saying that he did not believe Aaron Kesner's claim was valid, Heim undermined Kesner's case before the Joint Grievance Board. In these circumstances, we are constrained to conclude and find, contrary to the Administrative Law Judge, that by this conduct Respondent breached its duty of fair representation and restrained and coerced Kesner in the exercise of his Section 7 rights, thereby violating Section

8(b)(1)(A) of the Act. Accordingly, we shall order that Respondent cease and desist from such conduct.

Although we would normally grant an affirmative remedy for the above violation, we do not feel that such is warranted here for the following reason. The Administrative Law Judge found, largely on the basis of credibility resolutions, that Kesner's grievance concerning the failure of Foster and Kleiser to recall him from layoff status was without merit. The Administrative Law Judge found as a matter of fact that Kesner was initially hired by Foster and Kleiser as a temporary employee and that, as such, he did not accrue seniority for purposes of recall from layoff. Upon the record as a whole, we find no basis for reversing the Administrative Law Judge's findings in this regard and, therefore, do not find an affirmative remedy justified.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Chicago, Illinois, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 of the recommended Order:

"1. Cease and desist from:

"(a) Restraining or coercing employees in the exercise of their rights under Section 7 of the Act by failing or refusing to advocate their position in grievances which are heard by the Joint Grievance Board.

"(b) Restraining or coercing, in any way or by any means, its members or the employees of any employer engaged in commerce, because said persons have filed charges or given testimony under the Act or because said persons are not members of Respondent Truck Drivers, Oil Drivers, Filling Station and Platform Workers Local No. 705 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act."

2. Delete paragraph 2(b) from the recommended Order and reletter the subsequent paragraph accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT restrain or coerce employees in the exercise of their rights under Section 7 of the Act by failing or refusing to advocate their position in grievances which are heard by the Joint Grievance Board.

WE WILL NOT, in any way or by any means, restrain or coerce our members, or the employees of any employer engaged in interstate commerce, because they have filed charges, given testimony, or otherwise cooperated with the National Labor Relations Board in the administration of the National Labor Relations Act.

WE WILL NOT threaten employees with loss of job opportunities because they are not members of Local 705.

We hereby notify all our members, and the employees of all employers engaged in interstate commerce, that you are free to file charges, give testimony, or otherwise cooperate with the National Labor Relations Board, without fear of any reprisal on the part of this Union.

TRUCK DRIVERS, OIL DRIVERS AND FILLING STATION AND PLATFORM WORKERS LOCAL NO. 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (Labor Organization)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

DECISION

FINDINGS OF FACT

WALTER H. MALONEY, JR., Administrative Law Judge: This case came on for hearing before me upon two complaints issued and consolidated for hearing by the Regional Director of the Board's Region 13. These complaints allege that Respondent Local 705 (herein called Union or Local 705) violated Section 8(b)(1)(A) of the Act by illegally threatening Louis Kesner and his brother, Aaron Kesner, because they filed charges or lacked union membership. They also allege that Local 705 also violated Section 8(b)(2) of the Act by attempting to cause certain employers not to hire Louis Kesner because he filed charges and was not a Local 705 member, and that Local 705 also violated Section 8(b)(1)(A) of the Act by discriminatorily refusing to process a grievance filed by Aaron Kesner because he and his brother filed charges and gave testimony under the Act. The Union denies the allegations, and further asserts that the matters set forth in the complaints and amendments thereto are barred by limitations. Upon these contentions, the issues herein were joined.[1]

A. *Recent Board Cases Involving the Parties Herein, and Events Transpiring Before August 7 and 12, 1972*

Neither the charging parties nor the Respondent herein are strangers to the Board or its processes.[2] Charging Party Aaron Kesner is and has been a member in good standing of Local 705. Charging Party Louis Kesner has never been a member of Local 705, his application for membership having been denied on several occasions. A brief summary of their more recent encounters is as follows:

Case 13–CB–3273—Charge filed by Aaron Kesner against Local 705 on April 1, 1970, alleging wrongful refusal to process a grievance. Charge dismissed by Regional Director, and dismissal upheld on appeal on October 2, 1970. This case grew out of Kesner's dismissal

[1] There was much procedural sparring preliminary to the opening of the hearing in this case. As a result, the formal record is laden with an unusually large number of motions, answers, and interlocutory orders. The principal entries of formal papers are as follows: charge in Case 13–CB–4687 filed by Louis Kesner, February 7, 1973, and an amended charge filed on May 2, 1973; charge in Case 13–CB–4693 filed by Aaron Kesner on February 12, 1973, and an amendment thereto filed on March 27, 1973; complaint issued in Case 13–CB–4693 on March 30, 1973; complaint issued in Case 13–CB–4687 on May 10, 1973; order consolidating cases and rescheduling both cases, issued on May 10, 1973; Respondent's motion to dismiss filed May 14, 1973; General Counsel's answer to motion to dismiss filed May 21, 1973; amendment to complaint in Case 13–CB–4693, filed May 23, 1973; original answers to complaints in Case 13–CB–4687 and Case 13–CB–4693, filed May 31, 1973; Respondent's amended answer in Case 13–CB–4687, filed June 5, 1973; amended complaint in Case 13–CB–4687 issued on June 13, 1973; hearing held in Chicago, Illinois, on June 27, 28, and 29, and July 3, 5, and 17, 1973; briefs of General Counsel and Respondent, filed August 6, 1973. Documents purporting to be briefs were filed by each of the individual charging parties on August 7, 1973, and were read and considered by me despite their untimeliness.

[2] The complaint in the Aaron Kesner case (13–CB–4693) alleges, and the Respondent does not contest, that Foster and Kleiser is a division of Metromedia, Inc., a Delaware corporation; that Foster and Kleiser maintains its principal place of business in Chicago, Illinois; that the parent corporation maintains and operates a number of corporations, including radio and television stations, in various States other than Illinois, and that it did a gross volume of business in the operation of said stations in excess of $100,000 during the preceding calendar year. The complaint alleged in the Louis Kesner Case (13–CB–4687) that Associated Transport, Inc., is a Delaware corporation maintaining its principal place of business in New York, N.Y., that it is engaged in the trucking business, and that, during the preceding calendar year it derived in excess of $50,000 from transporting merchandise from its Chicago, Illinois, terminal to points and places outside the State of Illinois. The Respondent does not contest this fact. Moreover, the Board found in an earlier case (203 NLRB No. 139) that Associated Transport, Inc., was engaged in interstate commerce. Accordingly, I find that Foster and Kleiser Inc., Metromedia, Inc., and Associated Transport, Inc., are all employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that Truck Drivers, Filling Station and Platform Workers Union Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[3] On the record in this case, Aaron Kesner indicated that he was satisfied with an all-party precomplaint settlement concluded in Case 13–CA–12262. By the terms of this agreement Foster and Kleiser undertook to supply Local 705 with copies of certain records still extant relating to their refusal to recall Aaron Kesner in 1970. By letter addressed to me after the close of the record in this case, Aaron Kesner complained that the Union did not provide him with copies of the records supplied to them by Foster and

by Ryder Truck Lines for damage to company property and failing to report damage.

Case 13–CA–9801—Charge filed against Ryder Truck Lines by Aaron Kesner growing out of the same circumstances as Case 13–CB–3273. Dismissed, and dismissal upheld, by the Office of Appeals on October 2, 1970.

Case 13–CB–3290—Charge filed against Local 710, a sister local of Local 705 which represents warehousemen and miscellaneous categories of employees, by Aaron Kesner, alleging discriminatory failure by that union to represent him in a grievance relating to the doing of Saturday work. Dismissal by the Regional Director was upheld by the Office of Appeals on October 2, 1970.

Case 13–CB–3326—Charge filed against Local 705 by Aaron Kesner, alleging discriminatory refusal to represent Aaron Kesner. Charge dismissed by Regional Director. Dismissal upheld by the Office of Appeals on October 2, 1970.

Case 13–CB–4065—Charge filed against Local 705 by Louis Kesner, on November 11, 1971, alleging that Local 705 caused a trucking company, Woodcrest L & S, to terminate Louis Kesner. Charge was dismissed by the Regional Director on January 26, 1972.

Cases 13–CA–11505 and 13–CB–4326—Charge filed by Louis Kesner against Associated Transport, Inc., and Local 705, alleging that Local 705 caused Associated Transport to discharge Louis Kesner for discriminatory reasons, and that Associated Transport illegally complied the Local 705's request. Violation found and Board order issued on May 23, 1973 (203 NLRB No. 139).

Case 13–CA–12272—Charge filed March 31, 1973, against Foster and Kleiser, Inc., by Aaron Kesner, alleging a violation of Section 8(a)(3) and (5) of the Act. A complaint alleging a violation of Section 8(a)(5) was authorized by the Office of Appeals on June 20, 1973, relating to the failure of Foster and Kleiser to supply information relevant to the processing of Aaron Kesner's grievance relating the failure of Foster and Kleiser to recall him. An informal settlement of this case was entered into by all parties.[3]

Cases 13–CB–3571 and 13–CB–4457—Charges by the

Gasoline Retailers Association of Metropolitan Chicago against Local 705, alleging coercion of gasoline dealers and their employees in a citywide organizing campaign. Some 82 violations of the Act were found by Judge Ohlbaum in his decision in JD–394–73, issued June 29, 1973. These cases do not involve the Kesner brothers.

The above-recited cases are all precursors of the charges in this case. The charges herein were filed in February and March 1973 but they touch upon events which, in some instances, transpired 3 years earlier. The General Counsel would have the Board examine into matters which plainly occurred beyond the period of limitations, in order to obtain necessary background with which to understand events occurring within such period and also because such events might serve to illumine the animus which he says is held by Local 705 toward Aaron Kesner and his twin brother, Louis. Respondent contends most vigorously that such matters are time barred. An assessment of this case takes on greater clarity when the facts are recited in a time frame which is divided by the earliest date on which the operative events of a violation could have occurred, namely August 7 and 12, 1972. The pre-August 7 and 12 evidence is as follows.

On February 24, 1970, A. Kesner was referred by Local 705 to the Foster and Kleiser Company (herein called F & K) for a job as a truckdriver. He was interviewed before being hired by James A. Flannery. Flannery is now the Chicago operating manager for F & K, and was then the operating superintendent for F & K. Flannery testified that he told A. Kesner that he was being hired as a temporary replacement for driver Thomas Flood, who had called in sick. F & K employs approximately four drivers. According to A. Kesner, he was being hired as a permanent employee, having been told that Flood was going into the hospital and would retire shortly after his hospitalization. A. Kesner drove a semitrailer for F & K until April 22, 1970, when he and fellow employee William Sher were called into Flannery's office on that date. Flannery laid off both A. Kesner and Sher. Sher had more seniority than did A. Kesner, but he was not qualified to drive a semitrailer and thus confined his services to F & K to driving a so-called straight job. Flannery told both men that a reduction in business required the elimination of one driver, and that Flood would be returning to work on April 27, so that a driver had to be laid off to make room for Flood. According to A. Kesner, Flannery also said that if he needed a semitrailer driver he would recall Kesner ahead of Sher because Sher could only drive a straight job or pickup truck, even though Sher preceded Aaron Kesner in date of hire. Sher reportedly assented to this arrangement.[4]

Kleiser. He requests that the record in this case be reopened to take such evidence, and that I compel the Union to supply him with such documents. Whether or not the parties to a precomplaint settlement agreement in a CA case which is not before me have, or have not, complied with the terms of such agreement is a matter which should be addressed to the Director of Region 13 and not to me. The same applies to any request to compel the production of books and records subpenaed by the charging party. Accordingly, this request is denied. As for reopening the record in this case, there is no showing that the Charging Party could not, with due diligence, have required the production of such records at the hearing herein. At the hearing, he did not request a postponement for the purpose of enforcing any subpena. Accordingly, his motion to reopen the record is denied.

After his return in April, Flood continued to drive for F & K until September 30, 1970, when he retired. On or about March 29, 1971, Frank Reta, a full-service driver who was at the top of F & K seniority list, retired. Just before Reta retired, Sher was temporarily laid off for lack of work. When Reta left, an opening existed. Flannery called the union hall for a driver and spoke with Business Agent Joseph Desmyter. Desmyter told Flannery that Sher was now qualified to drive a semitrailer as well as a straight job and suggested that Sher be placed in the position on a trial basis. Flannery told Desmyter that he was not aware that Sher could drive a semitrailer, but agreed to take Sher back and try him out in Reta's slot. Early in January 1972, Sher returned. Flannery gave Sher a driving test, found him to be qualified, and retained him in the position of a semitrailer driver on a permanent basis.[5]

From time to time, F & K hires drivers on a daily or casual basis. Such drivers are paid off at the end of the day and do not acquire any seniority by virtue of their temporary employment. From the date of his layoff in 1970 until the filing of his grievance in the early spring of 1972, A. Kesner had been in contact with Sher occasionally on personal business, and testified, on the basis of his conversations with Sher, that Sher had in fact been recalled several times by F & K and had declined the recalls up until the time he was permanently rehired in March 1971. Sher also informed A. Kesner that other drivers were being used occasionally on a casual basis by F & K. Late in January 1972, A. Kesner saw Sher on the street driving an F & K semitrailer. At this point in time, he called Business Agent Joseph Desmyter and complained that Sher had been recalled by F & K in violation of the seniority provisions of the contract. The following day, January 28, 1972, A. Kesner, who was then out of work, went to the union garage to be dispatched. There were no calls for drivers on this day. On his way home, he saw an assertedly new driver, Leo Mann, who had not been employed at F & K driving the spring of 1970, driving an F & K truck near Lincoln and Western Avenues. A. Kesner called Desmyter again and complained of a seniority bypass. He also requested Desmyter to file a grievance. Desmyter called him back and reported a conversation between himself and F & K Superintendent Flannery in which Desmyter requested Flannery to remove Mann at the end of the day shift. A. Kesner persisted and told Desmyter that he wanted to file a grievance for not being recalled. Desmyter told him to forget it and refused to accommodate him. A. Kesner switched his call to an unidentified girl in the Union's complaint department, who reportedly informed

[4] Art. 8, sec. 3, of the joint cartage agreement, here in issue, provides:

> When it becomes necessary to reduce the working force, the last employee hired shall be laid off first; and when the force is again increased, then Employees are to be returned to work in the reverse order in which they were laid off.

[5] Art. 8, sec. 4, of the joint cartage agreement provides:

> A steady house driver shall have the right to elect to drive a vehicle engaged in general truckage when the working conditions of the house are changed. Seniority rights shall prevail in making such election
> . . . .

him that he could not file a grievance without his business agent's permission.[6] He then phoned Union Attorney Sherman Carmell, with whom he had become well acquainted by virtue of previous involvement in a multiplicity of other grievances and Board cases. Carmell told A. Kesner that he did not need the permission of a business agent to file a grievance. A. Kesner memorialized his complaint against F & K in a letter to Desmyter, reiterating the basis for his grievance. He also wrote a letter to the operating chief of Local 705, Secretary-Treasurer Louis F. Peick. This letter, the first of many from A. Kesner to Peick relating to F & K, launched the grievance which forms the subject matter of this case.

Grievances relating to matters other than discipline or discharge are governed by the terms of article 19, section 2, of the joint area cartage agreement. This agreement was concluded between Local 705, which is far and away the largest union signatory, six other Teamsters locals, several large employer associations, and many individual carriers. It is a 3-year agreement which covers several hundred individual employers and more than 25,000 city drivers and helpers in the Metropolitan Chicago area. Article 19, section 2, provides only a two-step grievance procedure. Within 5 days after notice of filing of a grievance, the union and the affected employer are obligated to meet to see if the matter can be informally adjusted. If this meeting is deadlocked and the union and the employer are unable to arrive at an adjustment, the matter is referred to what is commonly called the 12-man board.[7] This board, formally called the joint grievance committee, is composed of six employer representatives selected by specified trade associations, and six union representatives, whose mode of selection is not specified. Traditionally, Local 705 has always nominated several union representatives to this board. The 12-man board meets once a month, normally on the second Wednesday, to consider grievances which are deadlocked by the immediate parties to a dispute. In performing its function, the 12-man board adopts informal rules of procedure and keeps minutes summarizing its actions, although it does not keep a verbatim transcript of its proceedings. Parties to the second-step proceeding are notified of the time and place of the hearing and are afforded the opportunity to appear personally or through counsel and to present their viewpoints and supporting evidence. The board is empowered by the contract to require employers to produce books and records which are relevant to the dispute. After hearing the disputants, the board excuses them, discusses their case privately, and takes a secret ballot vote. A majority vote of those present is binding on the employer, the union, and the grieved employee. If the board deadlocks, no reference of the case to a neutral may be made under the contract. Instead, the contract specifically provides, in the event of a deadlock,

[6] Local 705 services about 25,000 employees in the Metropolitan Chicago area. It employs approximately 40–45 business agents to assist in its various functions, and assigns them to particular "barns," or employers, as the special responsibility of that agent. F & K is one of about 200 "barns" serviced by Desmyter.

[7] In former times, before its composition was enlarged, the joint grievance committee was referred to as the 10-man board.

[8] Art. 8, sec. 1(a), of the agreement provides: "In the event of a layoff an employee so laid off shall be given two (2) weeks' notice of recall mailed to his last known address. Unless physically unable to do so, an employee must respond to such notice within three (3) days receipt thereof and actually report to work in seven (7) days after receipt of notice unless otherwise mutually agreed to. In the event the employee fails to comply with the above, he shall lose all seniority rights under this agreement."

[9] Article 8, sec. 1, of the agreement provides: "(a) Employee seniority and not the equipment shall prevail for all purpose and in all instances."

that "either party shall be entitled to all lawful economic recourse to support its position in the matter."

On March 28, 1972, A. Kesner met with Flannery, F & K Operations Manager Harold Smith, Desmyter and Union Business Representative Donald Heim. Heim was previously acquainted with A. Kesner, having participated in processing the grievance filed by A. Kesner in conjunction with his dismissal from Ryder Truck Lines in 1969. In their discussion of the grievance, A. Kesner claimed that he had seniority over Sher, despite Sher's earlier date of hire, because at the time of the layoff of the two men in 1970, Sher could not drive a semitrailer while A. Kesner could. Hence, according to Aaron Kesner's reasoning, when a recall of a driver of a semitrailer was made by F & K, he should have been recalled rather than Sher since he had seniority as to the type of vehicle which Sher was now operating. A. Kesner also complained that various persons had been employed by F & K on a casual or temporary basis after Sher's recall, so that he, rather than unnamed casuals referred by the Union, should have been employed.[8] He wanted the Company to produce books and records indicating the names and dates of employment of these casuals so that he could establish a seniority bypass and then be paid an amount equivalent to what had been earned by F & K's temporary hires. Heim expressed to A. Kesner at this meeting as well as on the stand the opinion that A. Kesner did not have seniority vis-a-vis Sher, because seniority is determined by chronological priority of service in a particular "barn," not by time worked on a particular vehicle or class of vehicles used by any given employer. Desmyter agreed.[9] Flannery contended at this meeting that A. Kesner had not acquired seniority at F & K of any kind, inasmuch as he was hired in February 1970 as a temporary employee during the absence of Thomas Flood. He argued that A. Kesner had no permanent status and no seniority standing entitling him to a recall under any circumstances. A. Kesner complained that Heim expressed no interest in hearing his side of the case and took no interest in his position until he threatened to go to the Board. A union attorney, Stephen Horwitz, happened to be in the building at the time, interceded to calm down the parties to this discussion, and then suggested to Heim that the matter be referred to the joint grievance committee. Heim then deadlocked the first-step discussion and thus sent to the 12-man board the question of whether A. Kesner had ever acquired permanent status entitling him to be recalled as a laid-off employee in preference to casuals.

The board was originally scheduled to hear the case on April 12, 1972. However, by the time his case was called A. Kesner had absented himself to attend a civil court trial, so the matter was set over for the next committee meeting on May 10, 1972. In the interim, as detailed in Judge Powell's decision in *Associated Transport*, 203 NLRB No. 139, L.

Kesner was discharged by Associated Transport on April 28 at the request of Local 705. On May 4, 1972, L. Kesner filed the charges which resulted in the issuance of a complaint in that case.

L. Kesner testified that in November 1971 he was driving a truck for Woodcrest L & S and had encountered Local 705 Business Agent Harold Henkle on the street near Ashland and Adams. He lost his job with Woodcrest and went to the union office to apply for union membership and a job referral. Henkle, who was at the union garage from which referrals are dispatched, told him to "get the hell out of the hall." On November 11, 1971, Louis Kesner filed an unfair labor practice charge against Local 705, alleging that it had caused Woodcrest to terminate him (Case 13–CB–4065). The charge was dismissed by the Regional Office on January 26, 1972, and the dismissal was sustained on appeal.

L. Kesner also testified that in 1971 he had worked for various employers on referral from the Local 705 union hall, despite the fact that he was not a member. He mentioned that Local 705 Business Representative Louis Fina had given him referral slips to such unionized carriers as Roadway, Werner Continental, Strack, and PTL Cartage. On April 28, 1972, when he was discharged at Associated Transport, L. Kesner went to the union hall, saw Fina,[10] exhibited a withdrawal card from an independent trucking union he had belonged to years before, and asked Fina for a referral. Fina said that Associated Transport had called and had instructed Local 705 not to send out either of the Kesner brothers. Louis Kesner disputed that such a phone call had been made and said he would check up on it. Both Fina and Business Representative Bruno Fillipini told Louis Kesner in vulgar language to get out of the hall and that he would not be working for Associated any more.

On May 10, 1972, A. Kesner showed up for the joint grievance committee hearing, which is regularly held in the basement of the office building in which Local 705 makes its headquarters. He reported to the Local 705 office,

[10] Fina and Fillipini work in a cashier's window, or "cage," which is the initial union office encountered by any visitor to the Local 705 office. In addition to their other duties, they serve in effect as receptionists for the 200–300 persons who come to the union hall during a normal business day.

[11] In a letter supposedly written on May 10 to his brother and offered by the General Counsel to corroborate A. Kesner's testimony, A. Kesner attributed the threat to Desmyter rather than to Heim, and placed the time of the remarks as being after, not before, the board's meeting.

[12] At the first-step grievance meetings, the parties often prepare a short memorandum in the nature of an agenda minute to sum up the results of the meeting. Sometimes these memoranda are signed by all participants and sometimes they are not. The joint grievance committee proceedings are more formal and are regularly transcribed in summary, not verbatim, form by one or more clerical employees of Local 705 who, on behalf of the committee, then type their summarized versions of the proceedings, circulate them for correction to the members of the committee, and then regularly file them in a permanent record maintained by the committee. Local 705 proffered both kinds of documents as original probative evidence. They were received by me not as primary evidence but merely to corroborate testimony relating to the proceedings which they memorialize. A further examination of these documents convinces me that first-step agenda minutes and the summaries of the 12-man board meetings are admissible as primary evidence under the Federal Shopbook Rule, 28 U.S.C. 1732, as they are business records kept in the regular course of business. *N.L.R.B.* v. *Local 40, International Association of Heat and Frost Insulators and Asbestos Workers*, 451 F.2d 119, 121 (C.A. 2, 1971). Accordingly, any limitation placed on their admissibility at the hearing by

located on the fifth floor of the building, and was first ushered into the business agents' room, a large office space containing desks used by several business representatives. When he asked when his case was going to be heard, Heim reportedly stated to all who were present that "this guy, Kesner, has a twin brother that we got off the trucks at Associated Transport. If we catch him on the truck, we are going to break his arm and legs" and threatened the same treatment to A. Kesner. He also reportedly said he would try to get A. Kesner expelled from the Union. When A. Kesner threatened to go to the Board, Heim reportedly said: "If you go down to the Labor Board, I'll knock you on your ass." Business Agent Al Ceas reportedly said, "I better not catch you or your brother working out of my barns. Otherwise you and your brother will end up in the trunk of my Cadillac." Heim flatly denies the remarks attributed to him.[11]

Shortly after this asserted confrontation, the participants proceeded to the basement of the building for the regular joint grievance committee meeting. On this date, the meeting was presided over by Local 705 Secretary-Treasurer Peick. A. Kesner repeated to the Board the contentions he advanced to the first-step hearing. Flannery denied that Aaron Kesner had ever acquired any seniority rights. A. Kesner claims that the board then decided the case in his favor, meaning that it concluded that he had been permanently hired by F & K on February 24, 1970, that he was entitled to reinstatement, and that the Company should produce payroll records indicating the number of persons employed and hours worked by those less-senior employees who had bypassed him on the F & K seniority roster, in order to compute the backpay which was due to him. The minutes of the meeting reveal something quite different.[12] They state, in pertinent part:

> . . . it was decided that this case be referred back to the parties and that the Union Representative check all employment records of Mr. Kesner and payroll records to determine whether Mr. Kesner was hired as a

me is hereby overruled. The charging parties requested at the hearing, and in their posthearing memoranda to me, that I grant the same unlimited admission to various letters and notations proffered by them and by the General Counsel as primary evidence. At the hearing, such matters were admitted only insofar as they tended to rehabilitate the testimony of the declarants, to denote the registration of a complaint, or to indicate the dissemination of a threat, but not as primary evidence of the matters contained therein. It was the custom of Aaron Kesner after each meeting concerning his grievance to write a letter to Secretary-Treasurer Peick, to some other union official, or to his brother, or to make some written notation concerning the events of the meeting. These partisan accounts can hardly qualify as records kept in the regular course of business, unless one assumes that it is the regular course of Kesner's business to file grievances and charges. In light of A. Kesner's litigious history, it seems quite clear to me that these documents were prepared with the thought of possible litigation in mind and are thus suspect on that ground alone. Accordingly, I deny his request to treat such documents as primary evidence of the facts they contain. Instead, the testimonial utterances of the witness at the hearing are treated as his primary evidence, to be weighed as any other testimony in light of other evidence contained in the record. *Gouverneur Iron Works, Inc.*, 149 NLRB 316, 617; *Brotherhood of Railway, Airline and Steamship Clerks, (Safety Cabs, Inc.)*, 180 NLRB 126; *Dorwood Rental Company*, 178 NLRB 635; *N.L.R.B.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America, Local 127 [Armour Creameries]*, 202 F.2d 671, 673 (C.A. 9, 1953); *N.L.R.B.* v. *Local 776, International Alliance of Theatrical and Stage Employees [Cascade Pictures Co.]* 303 F.2d 513, 519–520 (C.A. 9, 1962).

replacement driver or as a steady employee and whether or not the Company worked extra men without recalling either Mr. Kesner or Mr. Sher, in which instance the men would be compensated for lost time.

A few days after the May 10 hearing, Aaron Kesner inquired of Desmyter whether or not he had obtained the additional records requested by the 12-man board. Desmyter replied that he was working on it. Several other calls in the ensuing months evoked the same inconclusive reply. A. Kesner testified that, in the course of one such call, Desmyter told him that he knew that his brother Louis' case was coming up for hearing soon and warned A. Kesner not to get involved in it. A. Kesner's reported reply to Desmyter was to mind his own business. Desmyter flatly denies issuing such a warning. Having gotten no results from Desmyter, A. Kesner again wrote to Peick to complain about Desmyter's inaction and footdragging in obtaining compliance with the joint grievance committee's May 10 request for records.

The L. Kesner case against Associated Transport and Local 705, alleging the discriminatory discharge of a nonunion driver, came on for hearing before Administrative Law Judge Powell on three dates—July 24, August 31, and September 1. Just before the case began, L. Kesner received a call from Union Business Agent Charles Cullinan, now deceased, who asked him if he thought he was going to "get away with it." The reference was presumably to the forthcoming case. On none of these occasions did A. Kesner testify or appear in the hearing room on his brother's behalf. His only connection with the investigation or trial of that case was a private phone call which he placed late in August to Stephen S. Schulson, the counsel for the General Counsel, volunteering to cooperate and to testify in the prosecution of the case.[13] Schulson told A. Kesner that he would call him if he needed him, but apparently Schulson did not need A. Kesner's testimony as he never called him.

During this same period of time, estimated by A. Kesner as being sometime in August,[14] he went to the union garage where he encountered Harold Henkle, the union business agent who is in charge of dispatching drivers for referral. Henkle reportedly said to A. Kesner that, if he ever caught his brother driving trucks, he would kill him, and added that if Peick ever found out that he had referred L. Kesner for jobs, he (Henkle) would be in trouble with the Union.

B. *Events Occurring After August 7 and 12, 1972*

On August 29, 1972, A. Kesner returned to the union office for a renewed first-step grievance meeting relating to the production of F & K records, and whatever contract violations those records might reveal. The meeting was held in the business agents' large office. In attendance were

[13] Aaron Kesner said that he gave a statement to the NLRB in support of his brother's case. It does not appear whether it was an oral or written statement. No conventional written affidavit was introduced. Accordingly, I interpret A. Kesner's phone call to Schulson as his "statement to the Board." In any event, no statement of A. Kesner, either oral or written, was ever made known to the Respondent.

[14] Henkle and A. Kesner had previously had disputes on the street concerning L. Kesner's utilization of the Union's referral service. In December 1971, A. Kesner met Henkle, who had mistaken him for L. Kesner. A. Kesner asked Henkle why he was trying to prevent Louis Kesner from working. Henkle replied that if he caught Louis Kesner working, he would kill him. On that occasion, when A. Kesner threatened to report any such action to the authorities, Henkle reportedly said, "If you go, I'll kill you too." I include this episode in a recitation of the pre-August 7 and 12 events, as it does not appear from the record whether it occurred before or after these significant dates.

Flannery, Desmyter, Heim, and Union Business Representative Peter W. Janopoulos. Desmyter reportedly said, in the course of the meeting, that A. Kesner had a twin brother "that we got off the trucks at Associated and we're not going to let him drive any trucks and he can't get into the Union." Other unnamed business agents reportedly chimed in on the conversation, adding that they knew A. Kesner's brother had worked for Associated Transport, and had filed charges with the NLRB. Desmyter reportedly asked A. Kesner if he was going to testify in his brother's case. A. Kesner said that he replied to the effect that it was none of Desmyter's business. Heim reportedly told A. Kesner that he had better not testify in the L. Kesner case or he would kill him. Heim reportedly said "Peter Janopoulos almost killed you three years ago, but I'll do the job this time." The union principals to these conversations flatly deny them. Thereafter, they moved to a conference room, where Janopoulos asked Flannery if he had brought the F & K records requested at the May 10 hearing. Flannery said no. When asked why not, Flannery replied "this guy's got no claim. I wouldn't give him anything." Desmyter reportedly said that he "never represented this guy to begin with and I'm not going to do it now." At this point, Peick came into the room, allegedly criticized Desmyter and Heim, and asked where the records were. Flannery replied that he was not going to submit them. Peick then insisted that he wanted the records brought in. The meeting concluded on this note. Shortly thereafter, A. Kesner made a written summary of the meeting and mailed it to his brother.

Flannery testified credibly that, shortly after the May 10 hearing, he mailed to the Union Kesner's employment application form, his health and welfare and pension statements, and a notice he had received from the Union giving F & K a refund for health and welfare contributions which had mistakenly been paid by F & K for Thomas Flood while Flood was off sick. Throughout the course of these proceedings, and until the settlement of the charge filed on March 31, 1973, in Case 13–CA–12262, F & K refused to produce any records other than those bearing directly upon the question of A. Kesner's initial employment as a temporary or steady employee. Throughout the course of the grievance proceedings here in question, F & K furnished no payroll records showing persons hired after A. Kesner's layoff, on the theory that those documents it had produced established that A. Kesner was not entitled to recall, either temporarily or permanently, that no seniority bypass had occurred, and therefore whom it hired and how much it paid them for work performed after April 22, 1970, was immaterial to the Kesner grievance and the issues before the 12-member board. While the term "records" is variously used in the conversations of August 29 and thereafter, the records principally in dispute were necessarily the payroll records of F & K casual employees

who assertedly had bypassed A. Kesner by being employed after he was laid off.

On October 18, 1972, another first-step meeting was held at the union office. In addition to A. Kesner, the meeting was attended by Flannery, Desmyter, and Heim. Bruno Fillipini also happened to be there. When A. Kesner arrived, Fillipini reportedly said to other union agents in Kesner's presence that "this fellow's brother ran down to the Labor Board and filed charges against the Union." He also reportedly said to A. Kesner, "we know your brother's working and we are going to keep him off the trucks, and if you don't like it you can run to the labor board too." Fillipini denies these remarks. When A. Kesner was admitted to the business agents' room where the meeting was to take place, Heim reportedly said to him, "You better get the hell out of here because I'm not going to represent you. You have no claim. You're going to have to represent and fight your own case." Desmyter reportedly said that he was not going to represent him. Both deny these remarks. Business Representative Ray Kolb reportedly said to Aaron Kesner after he threatened to file unfair labor practice charges, "You sit down and keep your mouth shut or I'll knock you on your ass. You're not going anywhere. You're not going to no labor board." Kolb denies this statement.

Those assembled for the first-step meeting then proceeded to a nearby conference room, where Janapoulos asked Flannery for the records. The Company produced Aaron Kesner's employment application and the other records previously furnished, claiming that, as Kesner had no seniority, it was not obligated to produce any other records relating to persons who were hired after he had been laid off. Janapoulos objected that the application form had the word "temporary" written on the bottom of it on this occasion, complaining that the word did not appear when the application was exhibited previously. Flannery stated that A. Kesner was always a temporary employee and that the Union was not going to make him into anything else. He said he brought no other records because he had no authority to do so. Janapoulos observed that they all had been wasting a lot of time for nothing. When it appeared that the matter was again going back to the 12-man board for resolution, Peick appeared and told Flannery that, if the case did go back to the committee, F & K would pay a thousand dollars in costs. Flannery said at the meeting that he was not amenable to any compromise.

After the meeting was over, Desmyter approached Flannery in the hallway and asked him if F & K would consider any kind of a compromise. Flannery replied that he had no authority to negotiate one, but asked Desmyter what he had in mind. Desmyter suggested that F & K might agree to pay A. Kesner's delinquent health and welfare payments, which then amounted to about $900,

[13] I credit Flannery. I cannot believe that he would take the trouble to bring to the attention of company headquarters a settlement offer to which he was personally opposed if he did not have advance assurance that A. Kesner would accept it.

[14] It should be noted at this point that, in July 1972, while the F & K matter was pending in the grievance machinery, Local 705 referred A. Kesner for employment to Glendenning Motorways. The position which A. Kesner accepted was a permanent job with a unionized carrier who, like F & K, operates under the provisions of the joint cartage agreement. A. Kesner was employed at Glendenning throughout the remaining processing of the F & K grievance, and was still employed at Glendenning when the present case came on for hearing in June and July 1973. Glendenning is another of Desmyter's "barns." It is undisputed on this record that, shortly before the unfair labor practice hearing in this case, Glendenning sought to discharge A. Kesner for physical incapacity and inability to pass certain tests. Desmyter interceded on A. Kesner's behalf and prevailed upon Glendenning to retain A. Kesner in a limited-service position where his physical limitations would not impair his performance.

together with a month's salary in full settlement of the grievance. The total package he estimated to be around $1,500 or $1,600. Flannery did agree to bring the offer to the attention of company headquarters in Los Angeles. At the same time, Janopoulos asked A. Kesner privately whether he would accept a compromise, and suggested a payment by F & K of A. Kesner's delinquent health and welfare payments plus 1 month's backpay. According to Janopoulos, A. Kesner told him to "go ahead. I will accept that if the Company will." Janopoulos also went to Flannery and asked him if the proposition was acceptable. Flannery told Janopoulos he would have to seek approval from company headquarters. They all came back together where A. Kesner was standing. Flannery testified that A. Kesner agreed to the proposal. Kesner denies he agreed to it, and asserts that he continued to demand reinstatement and full backpay.[15] Flannery contacted his company's headquarters and, 2 days later, phoned Desmyter and A. Kesner to relay the Company's approval of the proposal. In his telephone conversation with Kesner, Flannery said that he could have the check made out and available at the union hall the following day. Kesner replied "I don't know anything about it. Take it up with the Union," and, in effect, disowned the settlement. Accordingly, the matter came back for hearing before the joint grievance committee on November 8.[16]

Just before the joint grievance committee meeting on November 8, Janopoulos spoke privately with A. Kesner and urged him to take the company offer, advising him that, if the matter went to the board for a decision, he would lose his case. A. Kesner insisted that he would accept nothing short of what he felt the joint grievance committee had awarded him on May 10; namely full reinstatement and full payment for all seniority bypasses which had occurred since he was laid off in April 1970.

The joint grievance committee heard the dispute in its regular turn. A. Kesner and Flannery reiterated to the committee their conflicting views at some length. A. Kesner asked the board to reaffirm what he felt was its May 10 decision on his behalf, and complained to the board that the Company had never produced all of the records it was required to make available. Heim stated that he felt that Kesner could not accrue seniority in two different "barns" at the same time, and that if the board should rule that he was entitled to payment for so-called seniority bypasses, it would in effect be ruling that any employee who had worked in a series of different "barns" under the joint cartage agreement could accrue and hold seniority with several employers simultaneously. He expressed the opinion that such a situation would be contrary to the agreement and the practice in the industry and would generally upset labor relations in the area. The joint grievance committee voted to disallow the grievance

entirely. In the regular minutes of the committee meeting, the following entry was made:

> After considering the evidence, including the fact that during the eleven month period in question between 1970-1971, Aaron Kesner knew that Sher had been recalled and refused the job and filed no grievance; that the Company did not increase the work force during the period; that he did not grieve when Flood returned; and that the present grievances was not filed until March of 1972; upon motion and a second, the grievance is denied. Majority vote.
>
> The Company, the driver, and the agent were called back into the room and so notified.

A. Kesner claimed that, after the hearing, Heim made a gloating remark to the effect that he had told Kesner he was not going to get anything, and to get the hell out of the union hall. Heim denies these remarks.

On December 26, 1972, A. Kesner appeared at the union hall to pay his dues in person. Dues are paid at a cashier's window, or "cage," which is normally occupied by either Bruno Fillipini or Louis Fina. According to A. Kesner, Fina asked for his identification, saying "I want to be sure that you are Aaron Kesner and not your brother, Louis, that I am taking union dues from, because we don't want him in the union and I don't want to get stuck with him." A. Kesner showed him an identification, but Fina refused to accept a dues check, telling him to come back the following day. Fina reportedly added that the Union receives health and welfare reports from employers and will know if L. Kesner is working, and will stop L. Kesner from working for unionized employers. A. Kesner argued with him briefly and was told to return the following day.

A. Kesner returned the following day, sought to pay his dues, and was again requested by Louis Fina to present an identification. This time Fina accepted A. Kesner's dues check, but added that the Union stopped L. Kesner from working at Associated and would stop him from working on any other unionized employer's trucks. A. Kesner communicated this conversation to his brother. Fina denies having any run-ins with A. Kesner. He denied ever knowing of or about L. Kesner until immediately before the trial in the present case. He denied making any statement concerning the Union's efforts to stop L. Kesner from working at Associated Transport, denied discussing L. Kesner with A. Kesner. He did not recall A. Kesner's presence at the union hall in late December 1972.

L. Kesner testified that, in 1971, he worked for a total of 18 trucking companies, including such unionized employers as Terminal Transport, Tripp Cartage, Wilson Freight Company, Tucker Freight, Inc., Werner Continental, and Farquahar Cartage. None of these employers then required that he produce a union card before being hired.[17] He also testified that, after the conclusion of the NLRB hearing in his case on September 1, 1972, he applied for work with several employers, including most of the aforementioned, and all of those named, except Farquahar Cartage, required that he produce a referral slip from Local

[17] L. Kesner gave a pretrial statement to the Board that, since his hearing, Wilson Freight, Farquahar Cartage, R & V Cartage, and Mid-Continent, all unionized carriers, had employed him. Except as to Farquahar, he repudiated this statement on the stand.

705 before they would hire him. He worked for Farquahar up to November 27, 1972. It was his belief that the Union caused these employers to demand a referral slip and to refuse to hire him because he had filed charges and testified in the *Associated Transport* case although there was no evidence introduced in the record that the Union had contacted any of these employees with reference to L. Kesner. There is also no evidence that L. Kesner presented himself at the union hall for referral after September 1, 1972.

C. *Analysis and Conclusions*

1. . Union responsibility for the acts of various representatives

Respondent formally admits that Louis F. Peick, its secretary-treasurer, is and was an agent whose acts might impose upon it vicarious liability. It admits that Donald Heim and Joseph Desmyter occupied positions as business representatives but denies responsibility for their actions. It also denies responsibility for the acts of other business agents and representatives who were mentioned in the testimony. In its yearly filing with the Department of Labor, Local 705 lists under oath the following persons and their salaries:

Bruno Fillipini, Trustee (Officer)	$24,544.00[18]
Joseph Desmyter, Bus. Rep.	24,544
Louis Fina, Bus. Rep.	16,355
Donald Heim, Bus. Rep.	19,205
Harold Henkle, Bus. Rep.	16,555
Peter Janopoulos, Bus. Rep.	20,169
Raymond Kolb, Bus. Rep.	16,355
Albert Ceas, Bus. Rep.	24,544

Fillipini, Heim, and Desmyter are elected to their positions by the entire membership of the Local. The others are appointed. Business representatives are obligated, according to the Local's constitution and bylaws, to act as organizers, to endeavor to settle differences between employer and employees, to collect dues, fines, and assessments, and to perform such other duties as the secretary-treasurer may direct. In their testimony, the above-named persons, other than Ceas and Henkle, outlined similar or related duties while acting in the full-time employment of Local 705. It is clear to me from such evidence that, at all times material hereto, Louis F. Peick, Bruno Fillipini, Joseph Desmyter, Louis Fina, Donald Heim, Harold Henkle, Peter Janopoulos, Raymond Kolb, and Albert Ceas were agents of Local 705, for whose acts and omissions Local 705 bears responsibility under the Act. I so find and conclude. *International Longshoremen's and Warehousemen's Union, C.I.O. (Sunset Line and Twine Company)*, 79 NLRB 1487.

[18] At the hearing in this case, Fillipini testified that he was employed by Local 705 as a clerk.

2. The application of Section 10(b), and alleged variances between the charges and complaints

A considerably thornier question is posed by the Respondent as to whether there are impermissible variances between the charges and the complaints, and whether the violations alleged in the consolidated complaints are time-barred. Because of the multiplicity of charges, complaints, and amendments thereto, it is helpful to set them forth in tabular form:

Louis Kesner Case 13--CB--4687

Date	Entry	Substance of Allegation	10(b) period Began
2/7/73	8(b)(1)(A) & (2) charge	Attempts to cause employer not to hire Kesner because of cooperation with Bd. in Associated case	8/7/72
5/2/73	amended charge S(b)(1)(A) & (2)	Threats to employees to cause employers not to hire Kesner for cooperating with Bd. in Associated case	11/2/72
5/10/73	Original complaint	Oct. 18, 1972, Heim told A. Kesner he would see to it that L. Kesner did not work because he filed charges Dec. 26 and 27, 1972. Fina said Union was keeping L. Kesner from working because he filed charge.	
6/13/73	Amended complaint	Since Sept. 1, 1972, Resp. caused and attempted to cause employers to refuse to employ L. Kesner. Since Sept. 1, 1972, Resp. refused to refer L. Kesner for discriminatory reasons.	

Aaron Kesner Case 13--CB--4693

Date	Entry	Substance of Allegations	10(b) period Began
2/12/73	Original charge	Resp. discriminatorily failed to represent A. Kesner during grievance proceeding because he (A. Kesner) filed charges.	8/12/72

3/27/73	Amended charge	Adds that the illegal acts of Resp. against A. Kesner, charged on Feb. 12, were prompted in reprisal against protected acts of L. Kesner as well as against protected acts of A. Kesner himself.	9/27/72
3/3/73	Original complaint	August 29, 1972, Desmyter threatened A. Kesner if he testified in L. Kesner case. Aug. 29, 1972, Heim threatened A. Kesner if he testified in L. Kesner case. Oct. 18, 1972, Kolb threatened A. Kesner if he filed charge. Oct. 18, 1972. Heim threatened A. Kesner if he filed charge.	
5/23/72	Amended complaint	Since Feb. 1972 Resp. failed to represent A. Kesner fairly in grievance proceeding.	

Long before a period of limitations was written into the Act, the Board and courts were called upon to determine whether violations alleged by the General Counsel in a complaint ranged too far afield from the allegations found in the initial charge which vested the Board with jurisdiction to proceed. The first Supreme Court guidance in this area was given in *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350 (1940), when it said:

> We can find no warrant in the language or purpose of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board (in this case) were but a prolongation of the attempt to form a company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge, and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which follow as a consequence of those already taken.

After the introduction into the Act of a comparatively short period of limitations, this question became more acute, but it rarely occurs that a complaint is dismissed because it has expanded unduly upon a timely charge.[19] In *Kiekhaefer Corporation*, 127 NLRB 1381, enfd. 292 F.2d 130 (C.A. 7, 1961), the Seventh Circuit stated that the Board is empowered to deal with unfair labor practices which are related to those alleged in the charge and which are of the same class of violations as those contained in the charge, or which were a continuation of such acts done in pursuance of the same objects. In *Stafford Trucking Inc.*, 154 NLRB 1309, enfd. 359 F.2d 829 (C.A. 7, 1966), the Seventh Circuit also approved of a complaint, based upon a second amended charge, which was time barred, where the second amended charge contained allegations which were merely refinements of, and related back to, the Respondent's conduct which was charged in an earlier and timely charge. In *North Country Motors, Ltd.*, 133 NLRB 1479, the Board found that a complaint, alleging a violation of Section 8(a)(3) of the Act, was sufficiently supported by a charge alleging violations of Section 8(a)(1) and (5) of the Act, because the additional violations set out in the complaint took place during the same sequence of events to which the charge was aimed. A similar expansion upon a charge in a complaint was approved by the Second Circuit in *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.*, 209 F.2d

[19] Cf. *Red Ball Motor Freight, Inc.*, 157 NLRB 1237; *N.L.R.B.* v. *George A. Vare, and Edwin H. Vare, d/b/a McCarron Co.*, 206 F.2d 543 (C.A. 3, 1953).

393 (C.A. 2, 1953), and upon the same general theory. Thus, where a charge alleges intimidation of one named employee, the Board and courts have found it to be sufficient to support a complaint alleging intimidation of others when the conduct takes place in the same general course of the Respondent's conduct. *Texas Industries, Inc.*, 139 NLRB 365, enfd. 336 F.2d 128 (C.A. 5, 1964). See also *Stainless Steel Products, Incorporated*, 157 NLRB 232; *N.L.R.B.* v. *Central Power & Light Company*, 425 F.2d 1318 (C.A. 5, 1970).

One of the broadest court approvals for inclusion of charged conduct in a complaint was made by the Seventh Circuit in *N.L.R.B.* v. *Kohler Company*, 220 F.2d 3 (C.A. 7, 1955). In that case the charge set out certain discriminatory discharges. The complaint added a number of independent violations of Section 8(a)(1), which had no direct bearing on the discharges other than that they took place in the course of the same protracted struggle between the same union and the same company. The court upheld a Board order founded upon the expanded complaint, saying that the only limitation upon the expansion of a complaint is that the Board may not get

> so completely outside the situation which gave rise to the charge that it may be said to be initiating the proceeding on its own motion . . . To hold that the Board cannot include anything in a complaint that the respondent was not given notice of in a charge would greatly reduce the usefulness of the Board's investigative function. A major reason for having a General Counsel of the Board take over and try the charging parties' case is to make it possible for single employees to enforce their rights in an area where that takes considerable money and experience. The courts should not defeat this purpose by insisting that the failure of the charging party to initially describe in detail all the separate alleged unfair labor practices shall limit the issues to be alleged in the complaint and tried by the Board.

Tested by these admittedly flexible standards, I conclude that the L. Kesner charge of February 7, 1973, and the A. Kesner charge of February 12, 1973, are sufficiently broad to include the kind and class of all violations attributed to Local 705 in the two original and amended complaints, quite apart from those allegations set forth in the amended charges which were filed sometime later and which set forth the allegations with greater refinement. Considered in tandem, the initial charges allege illegal coercive tactics by the same Respondent against two closely related individuals growing out of considerations of union membership and the efforts of either or both of them to exercise statutory rights in seeking redress under the Act. As such, these charges address one intertwined course of conduct on the part of the Respondent which is also the subject of the amended complaints. As more fully set out later on, the difficulty confronting the General Counsel and the Charging Parties herein lies not with the charges or the

[20] Happily, from the standpoint of measuring variances between charge and complaint, no operative facts of a violation appear to have occurred in the brief period of time which elapsed between those dates.

complaints, but with the evidence available in the record to support them.

One further and related matter must be resolved. The L. Kesner charge can result only in a suppression of illegal conduct occurring after August 7, 1972. The A. Kesner charge can result only in suppression of illegal conduct occurring after August 12, 1972.[20] As this record is replete with testimony concerning events occurring outside the limitation period, a question necessarily arises as to its evidentiary character and operative effect. In this regard, our principal guide is *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *N.L.R.B. [Bryan Manufacturing Company]*, 362 U.S. 411 (1960), where a broad standard, not always easy of application, was laid down by the Supreme Court. Said the Court:

> It is doubtless true that Section 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of Section 10(b) requires that two different kinds of situation be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practices. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 362 U.S. 411, at 416, 417.

When tested by this standard, it clearly appears that the violations alleged in the consolidated and amended complaints, other than the failure of the Local 705 to give A. Kesner even-handed representation in his grievance against F & K, fall into the former category. If one accepts the General Counsel's theory of these cases, what is present here is not a continuing violation of the Act but a continuing attitude of hostility on the part of Local 705 toward the Kesners which breaks out from time to time in the form of specific timely charged violations of the Act. As to such matters, pre-August 7 conduct on the part of Local 705 and its agents merely lays bare putative post-August 7 violations and hence is clearly admissible. With regard to the alleged failure of Local 705 properly to represent A. Kesner in his grievance against F & K, it was clearly error for the General Counsel, on May 23, 1973, to

issue an amended complaint in Case 13–CB–4693 which purports to reach back "since on or about February of 1972." While the question of the A. Kesner grievance can hardly be understood without considering events dating back to February 1972 and indeed much earlier, the Union herein cannot properly be charged with any specific acts or negligence relating to A. Kesner which occurred before August 12, 1972. As further discussion will elaborate, the pre-August 12 evidence does not "lay bare" a putative unfair labor practice. Instead, it serves to exculpate Local 705 for certain conduct occurring after that date, so Respondent can hardly complain about its presence in this record.

3. The alleged breach by Local 705 of its duty to represent A. Kesner in processing the F & K grievance

The existence of a duty imposed upon a bargaining agent to represent all employees in a bargaining unit, free from unfair, irrelevant, or invidious discrimination, can be found in Board cases going back to *Miranda Fuel Co.*, 140 NLRB 181, reversed 326 F.2d 172 (C.A. 2, 1963). The general existence of such a duty in other statutes has an even lengthier ancestry. *Steele* v. *Louisville and Nashville Railroad*, 323 U.S. 210 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). While inveighing against discriminatory acts which were irrelevant, invidious, or arbitrary on the part of a labor organization, the Supreme Court has also recognized that the law does not restrict the actions of a union so narrowly that it cannot exercise a large measure of discretion in representing its membership.

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of relevant considerations, will serve the interests of the parties represented. A major responsibility of negotiators is to weight the relative advantages and disadvantages of different proposals. *Ford Motor Company* v. *Huffman*, 345 U.S. 330, 337, 338. (1953)

There the discrimination charged was a determination on the part of the union, in concluding a contract, to agree to the granting to one set of represented employees a seniority advantage over another group of employees, who were also represented by the same union and covered by the same contract. In *Manuel Vaca* v. *Niles Sipes*, 386 U.S. 171 (1967), the Supreme Court dismissed an employee's civil action claiming unfair representation on the part of the defendant union which had refused to process a grievance because, in the union's judgment, medical evidence to support the grievance was lacking. There the Court found that an exercise of judgment on the part of a union, in refusing to comply with the wishes of one of its members in the processing of grievances, was entitled to the same deference which the Court had earlier accorded to unions in the contract negotiation are in *Ford Motor Company, supra.*

Under Board law, a Union may not refuse to process an

employee's grievance simply because the employee is not a union member, *Port Drum Company*, 170 NLRB 555; or because the grievant has filed charges under the Act against the Union, *Amalgamated Clothing Workers (Canton Manufacturing Corporation)*, 170 NLRB 641, *Selwyn Shoe Manufacturing Corporation*, 172 NLRB 674; *Graham Engineering Co.*, 164 NLRB 679; *Dominick's Finer Foods*, 188 NLRB 873 enfd. *sub nom. N.L.R.B.* v. *Local 703, International Brotherhood of Teamsters*, 81 LRRM 2488 (C.A. 7, 1971); or because the grievant has become embroiled with a union official in an intraunion policy or political dispute. *Local 485, International Union of Electrical, Radio & Machine Workers (Automotive Plating Corp.)*, 170 NLRB 1234. However, where the Union's alleged defalcation in processing a grievance is the product of negligence, forgetfulness, or inadvertent errors, or in honest belief that it was pursuing a proper course as a statutory representative, its actions do not constitute an unfair labor practice. *Local Union No. 18, International Union of Operating Engineers (Ohio Pipe Line Constr. Co.)*, 144 NLRB 1365; *General Teamsters, Local 890 (Jack M. Roth Company)* 193 NLRB 1048; *Local 933, United Automobile Workers*, 193 NLRB 223. Moreover, as was pointed out in *Maxam Dayton, Inc.*, 142 NLRB 396 AT 418, the fact that the Act protects an employee from discrimination on the part of a labor organization when it is performing its statutory duty does not mean that the Act also guarantees the quality of such representation. The Fifth Circuit put it well:

> . . . it must be reiterated that every union decision which may in some way result in overriding the wishes or disappointing the expectations of an individual employee, or even of an appreciable number of employees, does not in and of itself constitute a breach of the fiduciary duty of fair representation. Even in the administrative stage of the bargaining contract, when the necessity of adjusting competing employee claims may not be as pressing as during the negotiation stage when rigorous scrutiny of each compromise might frustrate the Act's policy of encouraging industrial peace, the union must necessarily retain a broad degree of discretion in processing individual grievances. Thus, where the union, after good faith investigation of a grievance, concludes that the claim is insubstantial and refuses to encumber further its grievance channels by continuing to process the unmeritorious claim, its duty of fair representation may be well satisfied. *N.L.R.B.* v. *Rubber Workers Local 12*, 368 F.2d. 12, at 17, 18, (C.A. 5, 1966) cert. denied 389 U.S. 837.

In this case Local 705 did not fail to process A. Kesner's grievance for any reason, discriminatory or otherwise. Indeed, it ran out the string in processing the grievance, taking the matter all the way to the 12-member board. As noted before, the joint cartage agreement does not provide for references of such disputes to a neutral and instead leaves it to the parties to rely on self-help at the conclusion of a joint grievance committee determination in the event that such a determination is deadlocked. Here there was no deadlock, and no one has yet suggested that Local 705 violated the Act by failing to strike F & K in support of A. Kesner's complaint. The only possible predicate for a

charge of discrimination against Local 705 in this matter is that the entire proceeding, from beginning to end, was a sham, and that Local 705 was responsible for such a sham. This position is farfetched and groundless. It is far better founded to conclude, and I do, that Local 705 gave to A. Kesner not only due process but overdue process, going the extra mile for him, spurred on perhaps by A. Kesner's history and proclivity for litigation (and groundless litigation) in the area of failure to process grievances.

I credit Flannery's testimony that A. Kesner was hired by F & K in February 1970 as a temporary employee, and I discredit A. Kesner's calculated, argumentative, and sometimes contradictory testimony to the contrary. I find as a fact on this record that A. Kesner was hired to substitute temporarily for F & K driver, Thomas Flood, who in fact returned to work for F & K in April 1970, at the end of his temporary illness. Normally the Board is not disposed to pass upon the merits of a grievance. However, "the Board is not foreclosed from construing the provisions of collective-bargaining contracts in the course of passing upon complaints of unfair labor practices or in determining the remedies for such practices when found." (Citing *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421 (1967); *N.L.R.B.* v. *George E. Light Boat Storage, Inc.*, 373 F.2d. 762 (C.A. 5, 1967). *Local 485, International Union of Electrical, Radio & Machine Workers (Automotive Plating Corp.)*, 170 NLRB 1234, at 1234. The contract herein is silent as to whether temporary substitute hires may accrue seniority and recall rights. However, the nature of recall rights is wholly antithetical to the idea of temporary substitute employment, so it is quite understandable that the parties to the joint cartage agreement did not feel called upon to spell out this matter in writing. The facts in this record disclose that both parties to the contract agree that temporary substitute employees do not accrue seniority or enjoy recall rights. Accordingly, I construe article 8, section 3, of the said contract, relating to recalls, as being inapplicable to temporary substitute employees such as A. Kesner. Therefore, I conclude that A. Kesner's grievance against F & K was legally insupportable from its very inception. Accordingly, when Desmyter, on January 28, 1972, told A. Kesner to "forget it," and when Heim, on March 28, 1972, told A. Kesner that his grievance was without foundation and that he would not champion A. Kesner's cause (despite the fact that Heim deadlocked the first step of the grievance procedure on A. Kesner's behalf), both union agents were acting in good faith and were legally correct in interpreting and applying the provisions of the joint cartage agreement to A. Kesner's claim. Their fear that A. Kesner's contention would cause mild havoc as a precedent in their industry for the awarding of multiple seniority was a legitimate factor disagreeing with his contention. Whatever they or any other union official did thereafter in seeing to it that A. Kesner "got his day in court" was a work of supererogation. Neither Heim nor Desmyter were under a duty to swallow their own beliefs and speak on A. Kesner's behalf at the May 10 meeting of the joint grievance committee[21] or at the November 8 meeting of the committee, the latter

[21] A. Kesner is most articulate and quite capable of speaking on his own behalf to the committee or to anyone else.

the only committee meeting concerning A. Kesner which took place within the 10(b) period. Indeed, there was no reason they should not state to the committee their own good-faith and legally correct view that A. Kesner's claim was without merit.

I further find on this record that, at the May 10, 1972, meeting of the joint grievance committee, the committee did not make a conclusive finding on the merits in favor of A. Kesner, and I discredit A. Kesner's garbled, partisan account to the contrary. I find that the determination of the committee at the May 10 meeting was, as related in the minutes of the meeting, to remand the grievance to the parties involved in the first step for the limited purpose of ascertaining books and records relating to the question of whether A. Kesner *ab initio* acquired seniority status and recall rights at F & K, and, if so, whether extra men temporarily hired at F & K who bypassed them. While A. Kesner's unhappiness at the slowness of the grievance machinery following the May 10 hearing was directed at the asserted failure of Local 705 to obtain the records from F & K requested by the 12-man board, it is a fact that F & K promptly supplied the Union with certain records and that the delay in obtaining additional records was exclusively occasioned by the refusal of F & K, the owner and custodian of said records, to produce them until called upon to do so a year later in the settlement of the 8(a)(5) charge which A. Kesner filed in March 1973. Accordingly, it is fanciful for A. Kesner to blame Local 705 for the asserted neglect of F & K. As A. Kesner did not acquire seniority or recall rights at F & K in the spring of 1970, the question of who was hired on a temporary basis in his place after the date of his layoff, and how much they were paid, was immaterial to a proper resolution of the grievance pending before the joint grievance committee. I therefore conclude that the absence of such records in question did not prevent, and could not have prevented, A. Kesner from laying before the joint grievance committee all relevant and material facts bearing upon the basic issue which was before it.

It should be further noted that both Heim and Desmyter informed A. Kesner their unfavorable view of his case long before L. Kesner was discharged from Associated Transport, and long before L. Kesner filed charges against Local 705 in the *Associated* case. Accordingly, it cannot be said that their basic assessment of the A. Kesner case, or their later actions in regard thereto, were adversely influenced by L. Kesner's charge, regardless of their flamboyant comments regarding it. Moreover, A. Kesner's volunteered cooperation with the Labor Board in his brother's case was a casual, incidental matter which was never brought to the attention of union officialdom in any way. It might well be argued that, after years of harassment of Local 705 with groundless charges the Kesners had finally succeeded to the point of getting the Regional Office to issue a complaint in the L. Kesner case. Flushed with limited success, A. Kesner, on August 29, 1972, might well have hit upon the stratagem of tying his floundering grievance to the tail of the prosecution of Local 705 in another and wholly unrelated matter by interjecting himself, albeit

unsuccessfully, into his brother's case. In any event, I refuse to conclude that any action or determination by Local 705 in the processing of the A. Kesner grievance was discriminatorily made with a view toward reprisal against A. Kesner or L. Kesner on any basis.

While, as found hereafter, agents of Local 705 made certain illegal remarks to A. Kesner during the course of the several meetings which attended the processing of his grievance, the best test of what Local 705 intended in regard to the grievance is not what its agents said but what they did. The resolution of grievances involves essentially a continuing negotiation between the parties; it is more than simply a question of deciding matters of contract interpretation by the fiat of a board or committee. It is uncontested that, on October 18, 1972, the Union, acting through Desmyter and Janopoulos, attempted to and, in fact, did conclude with F & K a generous settlement of A. Kesner's nuisance claim. The question of reinstatement could not be resolved by negotiation; however, at this time, A. Kesner, through union auspices, had already obtained a permanent position with another unionized carrier with whom he was accruing seniority rights. Accordingly, he was not hurting for current or prospective income. Faced with these factors, Desmyter and Janopoulos attempted to resolve the other element remedial of his complaint, namely backpay, by arranging with F & K to pay A. Kesner an amount equal to A. Kesner's delinquent health and welfare account plus one month's wages. F & K properly treated this request as a nuisance claim but was willing to buy its peace in the amount of approximately $1,600. A. Kesner's testimony to the contrary notwithstanding, I find as a fact that, on October 18, when F & K Superintendent Flannery agreed to seek approval of such a settlement with his superiors in Los Angeles, A. Kesner actually agreed to this proposal as a final settlement of his grievance. His subsequent improvident, if not irrational, behavior in repudiating the settlement forced a confrontation on the basic issue by the joint grievance committee on November 8. Before this final meeting, Janopoulos pleaded with him to accept the settlement and warned him that he would lose the entire case if he persisted. A. Kesner assumed the risk of loss, did lose, and now blames the Union for his predicament. In arranging a settlement which would have brought to A. Kesner some $1,600 more than a strict interpretation of the Contract would entitle him, Local 705 acted both responsibly and effectively on A. Kesner's behalf. In light of these as well as its efforts later on in saving A. Kesner's job at Glendenning, Union efforts on A. Kesner's behalf make his present complaint, alleging a discriminatory mishandling of his grievance, appear as being not only groundless but peculiarly inequitable.

One last stone is cast at Local 705's handling of the grievance by A. Kesner. He says that the Act was violated by Local 705 because the 12-member board which met on

[22] Contrary to A. Kesner's testimony, I credit other evidence in the record to the effect that representatives of Local 705 sat as members of the 12-man board in almost every grievance that comes before it, including grievances involving Local 705 members.

[23] One final footnote might be dropped relating to the A. Kesner grievance. One of the several bases for dismissal of the A. Kesner grievance on November 8 was that it was not timely filed. The joint cartage agreement does not impose a flat contract deadline on the filing of grievances. The joint grievance committee here interposed a limitation analogous to laches, as well it might, since A. Kesner's grievance was filed nearly a year after F & K recalled Sher. A. Kesner was in contact with Sher from time to time during this period. He was well aware of F & K's hiring of temporary drivers long before he complained to Local 705. On this basis alone, and quite apart from the merits, the 12-man board acted well within the limits of ordinary fairness in disposing of the A. Kesner matter.

November 8 was composed, in part, of four persons who were members and agents of Local 705. He lodges no such complaint against the May 10 panel presided over by Local 705 Secretary-Treasurer Peick, whose decision, as construed by A. Kesner, is the slender reed upon which he rests his further allegation of wrongdoing. Normally, having a friend or friends in court—if that is what the joint grievance committee is—does not form the basis of a complaint. However, A. Kesner thinks that the Local 705 representatives were not friends but that in fact they torpedoed his case in its final hour. He also contends, as a general proposition, that whenever a matter comes before the 12-member board involving a Local 705 member, the union side of the panel should be composed exclusively of persons who are not members or employees of Local 705.[22] The implementation of such a rule would, in effect, deprive Local 705 of the opportunity of performing its statutory duty with respect to the second-step processing of grievances filed by its members. The implementation of such a requirement presumes that the 12-member board is, in effect, a court or a tribunal of some kind, which is held to a standard of strict neutrality in grievance proceedings, and is not merely the continuing arm of the union and employer parties to the joint cartage agreement who seek monthly to resolve, through further negotiations, contract interpretation questions which arise out of a document which other negotiating committees have previously concluded in writing. On the basis of this record, I am unwilling to make such a sweeping determination, and instead have confined my evaluation of the four Local 705 agents on the 12-member board, over whom the charges herein have asserted the Board's jurisdiction, to the same standard of fair representation which is expected and required of Local 705 agents at previous steps in the grievance machinery. I conclude that the mere presence of Local 705 agents on the November 8 panel of the joint grievance committee did not constitute a *per se* violation of Section 8(b)(1)(A) of the Act. I also conclude that these four persons, acting singly or in conjunction with others on the panel over whom the Board has acquired no jurisdiction herein, did not act in a manner which was unfairly, irrelevantly, or invidiously discriminatory as to A. Kesner or any one else similarly situated. They heard A. Kesner present his case in detail, and thereafter they discussed it at length, deciding it by a secret ballot on its merits. The grounds asserted for their action were legally supportable. They can hardly be charged with a violation of the Act for dismissing a stale and specious grievance.[23]

4. Alleged attempts to cause employers not to hire L. Kesner

Attempting to cause an employer to discharge, or to refrain from hiring, an individual for reasons related to union membership is a violation of Section 8(b)(2) of the

Act. The earlier *Associated* case, involving both the Respondent and a charging party herein, is one of a legion of authorities which might be cited for this proposition. When a union merely threatens such action for reasons related to union membership, when it threatens or takes such action in reprisal for the filing of charges or the giving of testimony under the Act, such conduct violates Section 8(b)(1)(A) of the Act. The complaint herein lodges such allegations against the Respondent.

An essential element of a violation of Section 8(b)(2) is that a union must have attempted to cause what would be a violation of Section 8(a)(3) for an employer to do. *Retail Clerks Local 1357 (Lit Brothers),* 192 NLRB 1171. The necessary causal connection between a union's attempt and an employer's act can be found where an exclusive hiring agreement, arrangement, or practice, exists between a union and an employer pursuant to which an applicant is frozen out of the hiring process through a denial of the use of the hiring hall. Where, as here, a contract requires only that the employer give the union an equal opportunity with other sources to provide it with job applicants, an 8(b)(2) violation must be founded on something more than the contract, since such a contract, by its terms, provides for a nonexclusive hiring hall. *Bird Trucking and Cartage Company,* 167 NLRB 626.

The General Counsel asserted at the outset of the hearing the existence of an exclusive hiring arrangement with Local 705, though he did not specify whether the arrangement was industrywide in the Chicago area, or whether it was confined to a limited number of trucking companies for whom L. Kesner had worked. However, evidence to support his contention in either regard simply did not come forth, L. Kesner testified that, despite his lack of membership in Local 705, he was frequently referred to jobs with unionized carriers in 1971 and 1972, even though his attempts to secure membership in the Local met with repeated rebuffs. He recited a list of unionized carriers who had employed him in the summer of 1972, after he had filed charges in the *Associated* case and while that case was at the hearing stage. However, after he had filed charges in the *Associated* case, and after the trial of the case was completed in late summer of 1972, he claims he was largely, though not entirely, refused employment by certain named union carriers when he made individual applications for work at their respective places of business. At no time within the 10(b) period did he ever apply to Local 705 for referral. He therefore argues that the fact, if it be a fact, that after September 1, 1972, five unionized carriers refused him employment without Local 705 referral slip whereas previously they had no such requirement constitutes an attempt by Local 705 to cause these carriers not to hire him for discriminatory reasons.[24] He admitted that one unionized carrier, Farquahar, hired him both before

[24] Several managerial witnesses from one unionized carrier, Tucker Freight Lines, gave varying testimony concerning their practice in hiring nonunion drivers: One said that the company practice at Tucker was that Tucker did not clear drivers with Local 705 before they were hired. Another said that Tucker hired drivers off the street as well as from the Local 705 hiring hall, but that Tucker did not normally hire applicants who did not possess a Local 705 card. He also said that Tucker employed two moonlighting Chicago policemen as drivers, although Union Agent Al Ceas asked that the two moonlighters not be employed as drivers. A third trucker witness said that he frequently calls the union hall for drivers, since it not only is convenient, but he has the assurance that anyone dispatched from the hall is both qualified to drive company equipment and has also passed certain medical examinations required of drivers by Federal regulations. He also testified that drivers are hired from time to time who are not dispatched from the Local 705 hall. Such conflicting evidence does not support a finding of an exclusive hiring arrangement between Local 705 and Tucker Freight Lines, and has no bearing on Local 705's relationship with any other carrier.

[25] *Associated Transport, et al. supra.*

and after the end of the trial of the *Associated* case. His testimony as to other named employers who refused him employment was impeached by a pretrial affidavit which conflicted with his testimony on the stand. His partisanship was strident and his memory selective. Accordingly, I discredit his testimony relative to the named carriers from whom he assertedly sought employment within the 10(b) period and who turned down because of a new company practice or policy which required a Local 705 referral slip. Even if believed, such testimony at best draws into question the hiring practices of certain companies and does not establish, by a preponderance of the evidence, that the Respondent union in this case "attempted to cause" said companies to impose such a requirement. Moreover, the use of September 1, 1972, as a "before-and-after" date for the purpose of supporting an inference of *attempts by the Respondent to cause* Employers *to layoff* L. Kesner is without merit. L. Kesner filed charges in the *Associated* case on May 4, 1972. If discrimination were caused by the Union owing either to nonmembership or to L. Kesner's act in filing a charge, May 4 would be a more significant "before-and-after" date by which to measure discriminatory actions. Yet after this date, by L. Kesner's own testimony, he was repeatedly employed by unionized carriers who hired him without demanding a Local 705 referral slip. If L. Kesner experienced difficulty in the fall of 1972 in obtaining employment as a truckdriver, it might well have been because, as Judge Powell pointed out in the *Associated* case,[25] he was having difficulty passing employer road tests as a city driver. Any other reason would be equally as speculative on the state of this record.

L. Kesner testified in this record that he had frequently been referred by Local 705 for employment despite his lack of membership therein. Hence, the thrust of any threats made by Union agents at this time to his brother with respect to efforts to deny L. Kesner employment must necessarily relate to the L. Kesner efforts to seek redress under the Act in the *Associated* case. L. Kesner's testimony in this record that Local 705 frequently referred him for employment precludes any general reliance upon the record in any other case to support a finding herein of discrimination based upon his lack of union membership.

I credit A. Kesner's testimony that, on October 18, Heim said, in relation to the L. Kesner charge in the *Associated* case, that he was stopping L. Kesner from working and that he would not drive a truck again if Heim had to break his arms and legs. I also credit A. Kesner's recital of remarks made on December 26 by Louis Fina that the Union, through its health and welfare records, knew where L. Kesner was working and that it would stop him from working. These statements were communicated to L. Kesner by A. Kesner. As these statements were made

within the period of limitations, I conclude that the Union thereby violated Section 8(b)(1)(A) of the Act.

5. Threats to A. Kesner relating to access to the filing of charges or giving testimony under the Act

On August 29, 1972, when A. Kesner went to the union hall to participate in another first-step meeting on his grievance, he was asked by Desmyter, in the context of some coercive hollering at him by various business agents, whether he was going to testify in his brother's case which was being heard at that time. Heim also said to A. Kesner on this occasion that, if he gave any information to the Labor Board in regard to the L. Kesner case or if he talked to anyone about it, Heim would kill him. On October 18, at the Union hall, when A. Kesner threatened to go to the Board if his grievance was not heard, Ray Kolb told him to sit down and shut up, "or I'll knock you on your ass. You're not going anywhere. You're not going to no labor board." I credit A. Kesner's account of these incidents, all of which occurred within the period of limitations. Accordingly, I conclude that they constitute a violation on the part of the Respondent of Section 8(b)(1)(A) of the Act.

Upon the basis of the above-findings of fact and upon the entire record in this case considered as a whole, I make the following:

Conclusions of Law

1. Respondent Truck Drivers, Oil Drivers and Filling Station and Platform Workers Union Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
2. Foster and Kleiser, Inc., Metromedia, Inc., and Associated Transport, Inc., and each of them, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. At all times material herein, Louis F. Peick, Bruno Fillipini, Joseph Desmyter, Louis Fina, Donald Heim, Harold Henkle, Peter W. Janopoulos, Raymond Kolb, Albert Ceas, and each of them, were agents of the Respondent, for whose acts and conduct the Respondent was and is legally responsible.
4. By threatening Aaron Kesner and Louis Kesner with reprisals because they filed charges or gave testimony under the Act, and by threatening L. Kesner with loss of employment because he is not a member of the Local 705, Respondent committed unfair labor practices in violation of Section 8(b)(1)(A) of the Act. Said unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

If a meaningful remedy is to be given in this case, one should also reflect upon the *Associated* case which has gone before. In that case, the Board found that the Respondent

[28] See, for example, the provisions of Illinois Revised Statutes, 1969 edition, relating to publication of the notice to creditors of an estate in probate (art. 3, sec. 194); or to the publication of an attachment levied against real property of an absentee owner (art. 11, sec. 22); or publication against a nonresident to obtain service of process under the Illinois "long-arm" statute (art. 110, sec. 15).

herein violated Section 8(b)(1)(A) and (2) of the Act, by causing an employer to terminate L. Kesner and to refuse to rehire him thereafter because of his lack of membership in Local 705. The facts of that case arose in the spring of 1972. The case was litigated in the summer of 1972. A broad order against Local 705, prohibiting all similar violations of Section 8(b)(1)(A) and (2) with regard to L. Kesner or all other employees, was entered by the Board on May 23, 1973. On the record of this case, as well as in its brief to me, Local 705 indicated that it would not comply with this order. As of August 14, 1973, petition for enforcement thereof had yet been filed.

On the record in this case, L. Kesner, among others, was asked what he desired in this case by way of a remedial order. On July 5, 1973, he replied "I believe the Board at Washington should make as broad an order as possible . . . that the Union shall stop, desist and take no further steps to prevent my brother or I from working, or if we do gain full employment, that the Union not interfere." L. Kesner's principal complaint is that he is still seeking meaningful relief for a violation of the Act by Local 705, which arose in the spring of 1972. The relief the General Counsel seeks in this case as to L. Kesner will merely add a postscript to another unenforced and will provide L. Kesner cold comfort indeed unless that order is enforced. Hence, I recommend that the Board move promptly to enforce its order in the *Associated* case.

It is important that not only to L. Kesner but A. Kesner and all others similarly situated in the trucking industry in the Chicago area be assured free and untrammeled access to the processes of the Board. Accordingly, I will recommend a cease-and-desist order to this effect against Local 705. It appears quite clearly from this record that the invoking of legal processes by union members and others offends against a deep-seated union ethic and provokes, on the part of union officialdom, sharp hostility and resentment. In order that all members of Local 705 may be reminded that their rights under the Act include free access to the Board, I will recommend that a Board notice to this effect not only be posted at the union office, but that it be published by the Respondent, either in a union newspaper or magazine by which Respondent normally communicates with its membership, or through publication in a daily newspaper of general circulation in the Metropolitan Chicago area, in the same manner that legal notices are generally given. Normally the publication of a Board notice other than by posting is not necessary, because posting usually serves to give adequate notification to all who have been adversely affected by the illegal conduct which the Board seeks to suppress. However, publication of an order or notice is a commonplace requirement found in statutes enacted in other areas of the law including statutes in effect in the State where the unfair labor practices in this case occurred.[28] I see no other practical way of adequately informing 25,000 union members who are employed and reside throughout a large metropolitan area, and who, in the normal course of their business, will never have the occasion to check a bulletin board on the

fifth floor of the building on South Ashland Avenue where Local 705 maintains its offices.

Upon the foregoing facts, conclusions of law, and the record of this case considered as a whole, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

ORDER[27]

Respondent Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from restraining or coercing, in any way or by any means, its members or the employees of any employer engaged in commerce, because said persons have filed charges or given testimony under the Act or because said persons are not members of Respondent Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Post at its office copies of the attached notice marked "Appendix."[28] Copies of said notice, to be furnished by the Regional Director for Region 13, shall, after being duly signed by a representative of the Respondent, be posted immediately upon receipt thereof, and shall be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Within 45 days after receipt of a copy of the attached notice marked "Appendix" from the Regional Director of Region 13, publish a copy of the same, after it is duly signed by a representative of the Respondent, in a newspaper, magazine, or other periodical published by the Respondent by which it regularly communicates with its membership, or, at the option of the Respondent, publish a copy of the same, after it is duly signed by a representative of the Respondent, once a week for 3 consecutive weeks in a daily newspaper of general circulation in the Metropolitan Chicago area.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

I FURTHER RECOMMEND that, in all other respects, the amended consolidated complaints herein be dismissed.

[28] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 75-1073

AARON KESNER,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

No. 75-1294

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL NO. 705, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petitions for Review of an Order of the National Labor Relations Board.

PETITION OF LOCAL 705 FOR REHEARING OR REHEARING IN BANC IN CASE NO. 75-1294.

Petitioner Local 705, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, requests that the panel of the court rehears its April 8, 1976 decision or suggests that the rehearing be in banc for the following reasons:

1. The court's April 8, 1976 opinion and order (herein "slip op.") denying Local 705's petition to review the Board's

order in Case No. 75-1294 (herein "the case") was received by counsel on April 12. This petition is therefore timely under Rule 40(a).

A. Section 10(f) Scope of Review.

2. The court found that the *Miranda Fuel* issue was not presented to the Board as required by § 10(e) of the Act relying in part on *Barton Brands* v. *NLRB*, 91 LRRM 2241 (7th Cir 1976) (slip op. at 3-5). In *Barton Brands*

> "[t]he Board denied Barton's claim that the complaint should have been dismissed because of Section 10(b) on the ground that the issue was not properly before the Board since Barton did not raise the issue in cross-exceptions to the Administrative Law Judge's decision, in its answer, *in a brief to the Board*, or at the Board hearing. *Id.* at 2246 (emphasis added).

Raising the issue in a brief to the Administrative Law Judge did not suffice because, "according to the Board rules [29 C.F.R. § 102.45(b)], such briefs are not part of the record before the Board." *Id.* at 2247 n. 20.

The court here has overlooked that at oral argument counsel for the Board and Local 705 agreed that Local 705 had raised the *Miranda Fuel* issue in its brief to the Board in support of cross-exceptions. A copy of that portion of the brief was filed with the clerk pursuant to the court's direction. Accordingly, because of the Board's concession adopted in *Barton Brands*, and because 29 C.R.F. § 102.46(a) makes Local 705's brief to the Board part of the record before the Board, the court should find that the *Miranda Fuel* issue was properly before the court.

We recognize and appreciate that the court's ultimate holding was that Local 705 could raise the issue in this court. However, because Local 705 presently intends to seek Supreme Court review of the case, we wish to obviate all procedural issues. Therefore Local 705 requests that the court grant this petition

and hold as an alternative to the present rationale that Local 705 met § 10(f) of the Act by raising *Miranda Fuel* in its brief to the Board.

B. The Merits of the *Miranda Fuel* Argument.

The court decided that *Miranda Fuel* was alive and well as a jurisdictional basis for Board action under § 8(b)(1)(A) of the Act, absent motives relating to union membership or activities. However, the court found that Local 705's contrary position constituted "serious legal objections, based on the coherent and historical analysis of relevant case law," and

> "that the recent Supreme Court decisions reaffirming the doctrine of fair representation and allowing a broader judicial exception to the preemption doctrine cannot be read to imply a holding that the NLRB has no jurisdiction over unfair representation cases, citing several Court decisions." Slip op. at 7-8.

We suggest that a rehearing in banc is appropriate because the Supreme Court has not squarely passed on the issue decided by this court, *i.e.*, whether "the National Labor Relations Board has patently, traveled beyond the orbit of its authority," slip op. at 7. Because this case raises an important question concerning the Board's jurisdiction under the Act it meets the criterion of Rule 35(a)(2), *cf. United States* v. *Williams*, 447 F2d 1285, 1287 (5th Cir 1971), and should be decided by the full court prior to Local 705 seeking review.

On the merits of the fair representation issue the court noted that Heim's statements before the Joint Grievance Committee could constitute "arbitrary conduct without evidence of bad faith," and concluded, based on "venerable tort law:"

> "It is one thing for a grievant to attempt to pursue his remedy without assistance and opposed only by one adversary. When that situation is compounded by two opponents, one of whom is supposedly his 'own people,' the bearing on the likelihood of his success assumes substantial significance. When one's own representative who has been willing to assume that status proclaims a lack of merit, it is indeed likely to be a *coup de grace* to the claim. The Board held that it was upon the facts of the case before us even though ultimately it was also determined that it was an unnecessary dagger.
>
> "On the basis of the record in this case, it is our holding that the Board's conclusion that Local 705, through Business Agent Heim, breached its duty of fair representation by failing to meet the obligation it undertook of fully and fairly advocating Kesner's grievance must be sustained on the union's petition to review." Slip op. at 9-10.

The court's opinion did not discuss *Humphrey* v. *Moore*, 375 US 335 (1964) (Reply Brief for Local 705 at 4 *et seq.*), or the Court's recent decision in *Hines* v. *Anchor Motor Freight, Inc.*, 91 LRRM 2481 (March 3, 1976).

Humphrey, as here, involved a seniority dispute where the union representative "supported the E&L employees before the Joint Conference Committee [where there was] no substantial evidence of fraud, deceitful action or dishonest conduct." 375 US at 348. The Court, contrary to this court's opinion, noted that a union "must be free to take a position on the not so frivolous disputes . . . [and] should [not] be neutralized when the issue is chiefly between two sets of employees. . . . To . . . gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Id* at 349-50. The Court was "not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Id.* at 349.

In *Hines* the Court revisited *Humphrey* with the significant observation:

> "We reversed the judgment of the state court *but only after independently determining that the union's conduct was not a breach of its statutory duties* and that the board's

> decision was not infirm for that reason. Our conclusion was that *the disfavored employees had not proved their case:* 'Neither the parties nor the Joint Committee exceeded their power under the contract and there was *no fraud or breach of duty* by the exclusive bargaining agent. The decision of the committee, *reached after proceedings adequate under the agreement,* is final and binding upon the parties, just as the contract says it is.' 375 U.S., at 351." 91 LRRM at 2485 (emphasis added).

In other words, "the union had not been guilty of malfeasance and . . . its conduct was within the range of acceptable performance by a collective bargaining agent. . . ." 91 LRRM at 2486.

Humphrey and *Hines* say that in the processing of a seniority dispute, a union is not guilty of malfeasance, nonfeasance or misfeasance, slip. op. at 9, where it takes a good faith position contrary to the grievant based on relevant considerations. Such conduct therefore cannot breach the union's duty of fair representation no matter how the elements of that duty are dissected or labeled.

This court, contrary to *Hines*, permitted the Board's ruling to "properly be considered as having prima facie aspects reflecting upon whether a union met its obligation of fair representation. . . ." *Compare* slip op. at 9 *with Hines*, 91 LRRM at 2487, where the Court said:

> "[*T*]*he burden on employees* [in a fair representation case] *will remain a substantial one*, far too heavy in the opinion of some. To prevail against either the company or the Union, petitioners [the employees] must show not only that their discharge was contrary to the contract *but must also carry the burden of demonstrating breach of duty by the Union*. As the District Court indicated, *this involves more than demonstrating mere errors in judgment.*" (Footnote omitted; emphasis added.)

In *Carpenters Local 742* v. *NLRB*, 444 F2d 895, 903 (DC Cir. 1970) and 91 LRRM 2596 (DC Cir. 1976), the court of appeals, having rejected the Board's use of the *per se* right of control test under § 8(b)(4)(B), rejected the Board's later use of "the right to control factor again appear[ing], by its own force, to have played a decisive role" in the Board's decision, 91 LRRM at 2603. Whether called "*per se*" or "prima facie", the result is the same. This court's opinion, however, impermissibly shifted the burden from the Board's general counsel (and Kesner) to Local 705 by creating either a per se rule or adding prima facie aspects to the case.

Finally, *Hines* suggests that a union cannot breach the duty of fair representation in the handling of a meritless grievance. The Court cites *Margetta* v. *Pam Pam Corp.*, 501 F2d 179 (9th Cir. 1974), for the proposition that a breach occurs where the union "subverts the arbitration process by failing to fairly represent the employee.'" 91 LRRM at 2487 n. 11, 2488. Yet, in *Margetta*, the court of appeals was careful to point out

> "that an employee may not attack a final arbitration decision, '. . . except on the grounds of fraud, deceit or breach of the duty of fair representation *unless the grievance was a 'sham, substantially inadequate or substantially unavailable.'* " 501 F2d at 180 (emphasis added).

Because the Board and this court found that Kesner's grievance was without legal merit, slip op. at 10-11—*i.e.*, a "sham [or] substantially inadequate" neither the general counsel, nor the Board, nor Kesner may attack the final decision of the Committee indirectly by claiming that Local 705 breached its statutory duty in handling a meritless grievance before the arbitral tribunal.

Based on the principles in *Humphrey* v. *Moore*, as reaffirmed in *Hines*, the court's opinion should be reconsidered either by the panel or in banc and the petition for review granted.

Wherefore, Local 705 requests that the court reconsider, pursuant to Rules 35 and 40, its opinion and order in Case No. 75-1294 and grant the petition to review or to modify the opinion and order.

/s/ SHERMAN CARMELL,
Sherman Carmell,
one of the attorneys for Petitioner Local 705.

Dated: April 20, 1976

CARMELL & CHARONE, LTD.
39 S. LaSalle Street
Chicago, IL 60603
(312) 236-8033

CERTIFICATE OF SERVICE

Stephanie Hawkins hereby certifies that a copy of the foregoing Petition Of Local 705 For Rehearing In Banc In Case No. 75-1294 has been mailed to the parties indicated below:

Mr. John Ferguson
Mr. Peter Carre
National Labor Relations Board
1717 Pennsylvania Avenue N. W.
Washington, D. C. 20570

Mr. Aaron Kesner
2617 W. Farragut Avenue
Chicago, IL 60625

/s/ STEPHANIE HAWKINS
Stephanie Hawkins

Subscribed and sworn to before me this 20th day of April, 1976.

/s/ MARILYN PERARES
Notary Public.

APPENDIX D.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

May 18, 1976.

Before

HON. JOHN S. HASTINGS, *Senior Court Judge.*
HON. WILBUR F. PELL, JR., *Circuit Judge.*
HON. WILLIAM J. BAUER, *Circuit Judge.*

AARON KESNER,
Petitioner,

No. 75-1073 *vs.*

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL No. 705, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAEUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervenor.

TRUCK DRIVERS, OIL DRIVERS, FILLING STATION AND PLATFORM WORKERS UNION LOCAL 705, etc.,
Petitioner,

No. 75-1294 *vs.*

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions for Review of an Order of the National Labor Relations Board, Washington, D. C.

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in cause No. 75-1294, no judge in active servicing having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in cause No. 75-1294 be, and the same is hereby, DENIED.